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IN THE

Supreme Court of the United States

October Term, 1968-1969

No. 615

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Petitioner,

v.

THE SCHWARZENBACH-HUBER COMPANY,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Textile Workers Union of America, AFL-CIO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on April 24, 1969.

Opinions Below

The opinion of the Court of Appeals is reported at 408 F. 2d 236; 70 LRRM 2805 (2nd Cir., 1969). It is printed in the Appendix, p. 1a. The decision and order of the National Labor Relations Board is reported at 161 NLRB No. 176, dated April 17, 1968 and is printed in the Appendix, p. 75a. The trial examiner's decision is printed in the Appendix, p. 77a.

Jurisdiction

The judgments of the Court of Appeals for the Second Circuit were made and entered on April 24, 1969. The petition of the Textile Workers Union of America, AFL-CIO, for leave to file a petition for rehearing *en banc* was denied on July 23, 1969. On July 18, 1969 Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including September 20, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and under Section 10(e) and 10(f) of the National Labor Relations Act, 29 U.S.C., Section 160(e), and (f).

Question Presented

Where substantial evidence supports the finding of the National Labor Relations Board: (a) that a majority of the employees in a unit appropriate for collective bargaining signed cards which duly authorize the Union to represent them for collective bargaining purposes; (b) that none of the employees establishing said majority was told that

the cards would be used solely to obtain a Board representation election; and (c) that the Company by other acts and conduct engaged in unfair labor practices designed to dissipate the Union's majority; may the Court of Appeals refuse to enforce a bargaining order based upon such findings, reverse the unfair labor practice findings of the Board and invalidate a large number of properly executed authorization cards thereby determining that the Union did not at any time have a majority?

Statutes Involved

The statutory provisions involved are the following sections of the National Labor Relations Act: Section 7, 29 U.S.C. Section 157; Section 8(a)(1), 29 U.S.C. Section 158(a)(1); Section 8(a)(2), 29 U.S.C. Section 158(a)(2); Section 8(a)(5), 29 U.S.C. Section 158(a)(5); Section 10(e), 29 U.S.C. Section 160(e); Section 10(f), 29 U.S.C. Section 160(f). They are printed in the Appendix, p. 127a.

Statement of the Case

A. The Facts

The case arises out of the Textile Workers Union of America, AFL-CIO's (hereinafter referred to as the "Union" or "TWUA") efforts to organize the employees of The Schwarzenbach-Huber Company (hereinafter referred to as the "Employer" or the "Company") at the Employer's plant in Altoona, Pennsylvania.

In late January 1967[1] the Union commenced an organizing campaign among the Company's employees. On Jan-

1. All dates refer to the year 1967, unless otherwise indicated.

uary 29th a first meeting, attended by some 41 employees, was held by Carl Frazier, the Union representative in charge of the campaign in Altoona. Mr. Frazier explained the goals, aims and purposes of the Union to the employees, opened the meeting for questions, after which employees began signing authorization cards which read as follows:

> "I hereby accept membership in the Textile Workers Union of America of my own free will and do hereby designate said TWUA as my representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment." (A 98a).[2]

To insure that there was no confusion as to the import of the employees' act of signing the cards, Frazier "slowly" and "carefully" read the card to the employees (A 104a). Some 35 of the assembled employees signed cards and thereafter both employees and Union representatives solicited cards, so that the Union possessed 99 cards on February 9th, 103 on February 14th, and 122 in the following few weeks (A 96a-97a).

On February 9th the Union sent a letter to the Company claiming to represent a majority of its production and maintenance employees and requesting recognition as collective bargaining agent. After receiving no reply the Union, on February 13th, filed an election petition. On February 14th the Employer, by letter, refused recognition (A 79a). On March 16th an election was conducted in which 106 votes were cast against the Union, 82 votes for the Union and 13 votes were challenged (A 79a).

2. "A" references are to the Appendix.

B. The Employer's Pre-Election Campaign of Coercion

1. The Small-Group Interrogations

Between February 20th and March 10th Brooks Taylor, the Plant Manager, held small group meetings during working hours, attended by 8 to 10 employees. These meetings, attended by nearly all the employees, were conducted in the Company's general office, at a place customarily used for disciplining employees and supervisory conferences and were sometimes also attended by Gerald Eldon, the Company's Vice President, and supervisors Glenn Rabenstein and William Lewis.

During these meetings, which at times lasted some two or three hours, repeated reference, by both Taylor and Eldon, was made to the closing of Altoona Rayon, a plant which permanently closed in 1953 at a time it was under contract to this Union (A 83a). Schwarzenbach-Huber employees were told "it (Altoona Rayon) quit and went south" because "they couldn't compete," the intimation being that the reasons for such failure lay with this Union.

At this meeting various employees were asked why they wanted a union and what did they think a union would do for them. They were told what they had in benefits, that a union couldn't get any more than they already had, and that they didn't need a union, and they were urged to vote against this Union (A 82a-84a).

2. *The Individual Interrogations*

In early March supervisor Merle Grossman started a conversation with employee Judith Massini in which he told her to vote "no", inquiring why she wanted a union, and told her that if the Union got in, the first thing it would do is ask the Company to deduct union dues from paychecks and the Company in return would ask that the Union give up a paid holiday or eliminate a job. Plant Manager Taylor was called over to corroborate these statements and he indicated to Massini that if the Union got in "the slate would be wiped clean" and the Company would negotiate "from scratch with no paid holiday or vacations" (A 86a). The Trial Examiner and the Board credited the testimony of Massini over the qualified denials of Grossman and Taylor (A 91a).

Two days before the election Supervisor Lewis called employee Don Bradley off his job and into his office where Lewis told Bradley that he was concerned about his own job should the plant close or move from town. Lewis then questioned Bradley about the rumor that he was to be the local president and asked him what he thought the Union would do for him. Lewis also asked Bradley whether or not it was true that the Union was advocating bumping[3] in the department and that several bosses were to be replaced. Bradley replied that he knew of no plan to replace bosses nor for plant-wide bumping (A 81a-83a).

Supervisor Rabenstein, too, stressed the issue of his own loss of job and, by implication, mill closing, when a

3. "Bumping" is a term used to describe a seniority system whereby employee Jones, with more plant-wide seniority, laid-off from department "X", can replace or "bump" employee Smith, of department "Y" who may have more seniority in department "Y" but less plant-wide seniority.

day or so before the election he called employee William Wilson into his office for a talk. Rabenstein told Wilson he was concerned for his own job as well as many others should the Union win the election and he was here to protect his job and the jobs of others in the mill (A 86a).

3. Threats of Plant Moving or Closure

As noted above, both supervisors Lewis and Rabenstein, in their conversation with employees, stressed their fears that unionization would mean the possible loss of their jobs, thereby intimating that if the Union were to win the election the plant would close or move.

Meanwhile the Company pelted employees with written messages threatening to close the plant. On March 1st it mailed to every employee a leaflet which portrays a busy open plant with billowing smoke emerging from its chimneys and the legend "We have, here in Altoona, one of the finest textile mills in the world * * * South Carolina not excluded. (Don't let's wreck it now!)"

Below that is a picture of a closed and broken down plant with a few feeble wisps of smoke emerging from its stacks and the legend, "Remember Altoona Rayon" (A 86a-87a). As noted earlier, Altoona Rayon permanently closed its plant in 1953 at a time it was under contract to this Union.

On March 9th a letter from the Company's president Robert Schwarzenbach sent to all employees began with the statement "To say that I am concerned about the future of the mill is putting it mildly." He then reviewed some

of the production problems of the past few years, reminding the employees frequently of the danger that the plant might not survive and concluded by stating:

> "Look at Juniata's 20-year record of around-the-clock employment. And the TWUA? Why isn't there a single major textile operation left in the Northeastern states? Is that the kind of job security the union keeps talking about?
>
> "Why is it that today virtually all our competition is located in the South? Simple enough! The mills down there feel safe from the bickering, discussion and unreasonable demands that come with the TWUA. Remember Altoona Rayon." (A 87a-88a)

A few days prior to the election Schwarzenbach appeared in Altoona and gave a speech to the employees on each shift, making further reference to plant closure or moving. He stated that he could easily sell or lease his plant to a company like Sylvania. He told one shift that if the Union was successful he didn't see how he could stay on but would try to make a go of it. Further reference to the New England plant closure and Altoona Rayon were made to symbolize plant closure due to unionization (A 85a-86a).

On March 20th, a few days after the election, Schwarzenbach sent another letter to the employees, leaving little doubt as to the meaning of his prior statement for in the second paragraph he said:

> "As a group you voted wisely since what actually was at stake was the future of the mill and the long-term security of your job." (A 88a)

4. The Arbitrary No-Solicitation Rule

On February 22nd employee Clyde Brown was called into Plant Manager Taylor's office and given a reprimand and written warning for having discussed the Union with another employee during working time and in the working area.

Prior to this time the Company had no written no-solicitation rule and no method for making the alleged no-solicitation policy known to the employees. The Company had a general policy of permitting all kinds of solicitation in non-working areas and in working areas except when a specific complaint was received about it. In August a solicitation of funds for a sick employee had taken place during working time and in the working areas with a supervisor during the soliciting (A 84a-85a).

C. Post-Election Conduct

On April 18th the Company mailed a notice to the employees announcing the establishment of an Employee Committee which would present employee grievances to the Company. The Company determined the basis of membership on the Committee, chose the membership and determined the length of time each employee member was to serve. The Committee had no constitution or by-laws or officers, held no meetings on its own and no election was ever held to ascertain whether or not the employees wanted the Committee to represent them. No dues were collected and employee members were paid for time spent at meetings called by the Company. The Committee submitted grievances with respect to condolence and bereavement pay,

vacation schedules, employee bulletin boards, new wage scales and additional restrooms (A 91a-94a).

On July 27th the Company sent a notice to its employees indicating that the Committee would no longer exist and had been disbanded (A 95a).

D. Board's Conclusion and Order

The Board concluded that the Company violated Section 8(a)(1) by disciplining employee Brown for his organizing activities; interrogating employees on an individual and group basis; threatening that if the Union were to win, the plant would close or move and jobs would be lost; and threatening the elimination of existing benefits as a condition of bargaining with the Union (A 89a-91a). In addition, the Board found the Company to be in violation of Section 8(a)(2) and (1) by unlawfully dominating, interfering and assisting with the establishment and administration of the Employee Committee (A 94a-95a). Finally, the Board found that the Union represented a majority of the employees in an appropriate unit and that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (A 118a).

The election was set aside and the Company was ordered to cease and desist from the unfair labor practices found and from interfering with the employees' rights guaranteed in Section 7 of the Act and further ordered: to post remedial notices; withdraw recognition from the Employee Committee; expunge the written warning from employee Brown's file; and to bargain collectively with the Union upon its request (A 75a, 120a-121a).

E. The Decision of the Court of Appeals

The Court of Appeals granted the petition to review and granted in part and denied in part the cross-petition of the Board for enforcement of its order (A 2a).

The Court upheld the order setting aside the election and sustained the Board's finding of the Company's violation of Section 8(a)(2) for its conduct in regard to the Employee Committee and Section 8(a)(1) for the Company's reprimand to employee Clyde Brown (A 27a, 40a-41a).

Contrary to the Board and the Trial Examiner the Court did not find the Company in violation of Section 8(a)(1) of the Act for its interrogation of employees Bradley (A 40a) and Massini (A 39a) and the small-group interrogation (A 30a). Nor did the Court find that the Company's threats of moving or plant closure were violative of Section 8(a)(1) (A 38a). Finally, the Court, after invalidating a large number of signed authorization cards, concluded that the Union did not have a majority and therefore the Company did not violate Section 8(a)(1) and (5) when it refused to recognize the Union and, under these circumstances, a bargaining order would not effectuate the purposes of the Act (A 4a).

Reasons for Granting the Writ

A. Conflict With Decisions of the Supreme Court

In this case the Second Circuit rejected the notion, recently adopted by the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., Inc., et al.*, —— U.S. ——, 71 LRRM 2481, that authorization cards may create a duty to bargain

with a union. Their attitude toward authorization cards was succinctly set forth as follows:

> "* * * This 'representation' card business is an abomination. As presently administered it is a pro-Union device that serves no other purpose than to afford a method by which elections can be by-passed and the Unions ushered in without giving the employees individually or collectively any voice in the matter." (A 25a-26a)

This attitude is more readily apparent from the Court's wholesale rejection of authorization cards in this case. Citing with approval the approach of *N.L.R.B.* v. *S. E. Nichols Co.*, 380 F. 2d 438 (2d Cir. 1967) the Court of Appeals rejected the approach of *Cumberland Shoe Corp.*, 144 NLRB 1268, enf. 351 F. 2d 917 (6th Cir. 1965) and *Joy Silk Mills, Inc.* v. *N.L.R.B.* 185 F. 2d 738 (D.C. Cir. 1950) (A 17a-18a) and invalidated the 35 cards signed at the January 29th meeting because the Union representative did discuss the Union's intent to seek an election but "did not tell those present that, even if the Union lost the election, it could demand recognition and the right to bargain upon the basis of the cards" (A 10a). The Court characterized this conduct as "flagrant misrepresentations," "willful omission" and "deceitful," the effect of which was to "perpetuate a fraud" upon the people present. Without any testimony to support its finding, the Court, by inference, drew conclusions as to the impact of these omissions on the thoughts and minds of those card signers (A 10a-11a).

It was this very approach that the Supreme Court in *Gissel* sought to void. Citing *N.L.R.B.* v. *S. E. Nichols Co.*, *supra*, *Gissel* rejected that case's approach toward author-

ization cards and adopted the *Cumberland Shoe-Joy Silk* approach stating:

> "We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry" (71 LRRM at 2493).

and again:

> "In resolving the conflict among the circuits in favor of approving the Board's Cumberland rule, we think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorized the union to represent him and then telling him that the card will probably be used just to get an election" (71 LRRM at 2492).

The court of appeals engaged in a lengthy and complicated discussion as to whether the Union had a majority of cards in an appropriate unit of 197 or 199 employees at the time its demand was made on February 9th or at the time the demand was refused on February 14th. The Board, relying on *N.L.R.B.* v. *Gotham Shoe Mfg. Co.*, 359 F. 2d 684 (2d Cir. 1966) concluded that the Union's demand impliedly continued in force until the Company's reply and the Union therefore had a clear majority in a unit of either 197 or 199. The court of appeals concluded that the cut-off date should be February 9th, that the Union did not have a majority and, therefore, a bargaining order was not appropriate. *Gissel,* however, sustains holdings

which state that the Board may issue a bargaining order where the Union at any point had a majority and, under some circumstances, may issue such an order in the absence of a Section 8(a)(5) violation. Thus, the question as to when the Union obtained its majority is irrelevant.

Gissel, in discussing the Fourth Circuit's refusal to validate a bargaining order based upon authorization cards, indicated that the Circuit "left open the possibility of imposing a bargaining order, without need of inquiring into majority status" * * * "in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices" and stated for a long time the Board has issued bargaining orders, absent a Section 8(a)(5) violation or demand, where the unfair labor practices made it the only available remedy. Stating approval for the use by the Board of a bargaining order in "less extraordinary cases" this Court said:

> "The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should re-emphasize, where there is also a showing that *at one point the union had a majority;* * * *" (71 LRRM at 2495, emphasis ours).

Directly on point, this Court held in *Gissel,* that the threats of plant closure in *Sinclair Co.* v. *N.L.R.B.* Case No. 585, which were similar in nature to the threats made in the instant case, were by their nature "so coercive that, even in the absence of an Section 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats" (71 LRRM at 2496).

In light of *Gissel,* this court of appeal's decision is improper for the very nature of the unfair labor practices

requires that a bargaining order issue even in the absence of a Section 8(a)(5) violation. Moreover, had the court of appeals not improperly invalidated 35 authorization cards (improper in light of this Court's holding in *Gissel*, discussed in detail in Section "A" of this writ) the Union would have 122 valid cards, an overwhelming majority of a unit of 197 or 199 employees, and the bargaining order issued by the Board is a proper remedy under the holding in *Gissel*, which, as previously noted, states that the Board has the authority to issue bargaining orders where it can be shown that at one point the Union had a majority.

B. Non-Compliance of the Court With the Supreme Court's "Substantial Evidence" Doctrine

In *N.L.R.B.* v. *Gissel, supra,* this Court reiterated the holding of *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404 and *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, in noting the Circuit's failure to apply the "substantial evidence" rule to cases decided by the Board. In *Gissel* this Court said:

> "It is true that a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship" (71 LRRM at 2498).

and again in discussing an appropriate remedy:

> "It is for the Board and not the courts, however, to make that determination based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity" (71 LRRM at 2494, footnote 32).

In the instant case the Second Circuit has exceeded its scope of review in the manner condemned by this Court.

In this case there was substantial evidence to support the Board's finding that the threats of plant closure and moving were coercive and in violation of Section 8(a)(1). The Trial Examiner and the Board based their decision upon the manner in which the threats were made, by whom, their timing, their frequent reference to other plant closing in the area and the constant talk about loss of jobs should the Union win. Stating that it could "find absolutely nothing to indicate antagonism or hostility toward this Union or any Union" (A37a) in such conduct, the court of appeals reversed the finding of a Section 8(a)(1) violation by the Board. Such conduct not only ignores this Court's direction in *Universal Camera, supra,* but is contrary to the holding in *Gissel* that:

> "Conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof" (71 LRRM at 2497).

and that:

> "If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable predication based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment" (71 LRRM at 2497).

The Second Circuit's mistaken interpretation of its reviewing function can be found throughout its opinion. Of the interrogation of employee Massini by Supervisors Taylor and Grossman during which Massini was told the

Union would have to bargain from scratch and which the Board, crediting Massini testimony, found a Section 8(a)(1) violation, the court of appeals said "Nevertheless it seems highly improbable that Taylor would make such a statement" (A 39a). Of the incident between employee Bradley and Supervisor Lewis during the course of which Lewis indicated he feared the loss of his job and that of others if the Union were to win, and which the Board found objectionable and in violation of Section 8(a)(1), the court of appeals characterized these statements as "idle rumors" which had been "inflated into an unfair labor practice" (A 40a). Of the small-group interrogations which were found by the Board to be held in an improper atmosphere, coercive in nature and in violation of Section 8(a)(1), the Court found them to be mere "dialogues rather than interrogation" (A 28a).

In determining the Company's motivation for its conduct from the above, the facts, at best, give rise to more than one view. Where there is a difference between the Board's view and the Court's, the Court may not substitute its view nor "displace the Board's choice" between the two views where the Board's decision is supported by substantial evidence. *Universal Camera, supra.* This is true even where the Court could have justifiably drawn a different conclusion had it heard the case *de novo.*

Either through an inadvertence or because it was thought unnecessary because of the Union's over-all majority, the exact size of the unit on February 9th was never resolved by the Trial Examiner nor the Board. At issue was the eligibility status of employees Krise and Becker—

a question which should rest solely with the Board because of its expertise in this area. Yet, the court of appeals, again over-stepping its reviewing function, substituted its expertise for that of the Board and concluded that both employees were eligible. Such a decision is clearly beyond the bounds of review set forth by this Court in *Gissel, Walton* and *Universal Camera, supra.*

The Board sustained numerous findings of credibility made by the Trial Examiner in determining the validity of the Section 8(a)(1), (2) and (5) charges, exercising its particular expertise in the area of employer-employee conduct. In accordance with the scope of review delineated by *Universal Camera* and reiterated by this Court in *Walton* and *Gissel* such finding, when as here, supported by substantial evidence, should not have been disturbed on review.

Conclusion

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: September 10, 1969

Addendum

Due to the length of the lower court opinions, the Appendix, consisting of the Court of Appeals' Decision (A 1a), the Board's Decision and Order (A 75a), the Trial Examiner's Decision (A 77a), and the Statutes involved (A 127a), has been reproduced in a separate volume.

IRREME COURT, U. S.

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Supreme Court of the United States

October Term, 1968-1969

No. 615

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
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APPENDIX

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APPENDIX

Opinion of the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 130—September Term, 1968.

(Argued November 8, 1968 Decided March 5, 1969.)

Docket No. 32286

THE SCHWARZENBACH-HUBER COMPANY,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Intervenor.

Before:

MEDINA and WATERMAN, *Circuit Judges,*
and LEVET, *District Judge.**

Petition for review and cross-petition for enforcement of an order of the National Labor Relations Board.

Schwarzenbach-Huber Company petitions to review and set aside an order of the National Labor Relations Board finding the Company in violation of Sections 8(a)(1)(2), and (5) of the National Labor Relations Act, as amended,

* Of the Southern District of New York, sitting by designation.

29 U. S. C., Sections 158(a)(1)(2) and (5), setting aside a representation election, and directing the Company to bargain with the Union. The Board cross-petitions for enforcement. The decision and order of the Board are reported at 170 N. L. R. B. No. 176 (April 17, 1968).

Petition to review granted; cross-petition for enforcement granted in part and denied in part.

MARSHALL C. BERGER, New York, N. Y. (Robert Abelow and Weil, Gotshal & Manges, New York, N. Y., on the brief), *for petitioner.*

RICHARD N. CHAPMAN, Attorney, National Labor Relations Board, Washington, D. C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Lawrence M. Joseph, Attorney, National Labor Relations Board, Washington, D. C., on the brief), *for respondent.*

DANIEL B. JORDAN, New York, N. Y. (Cornelius J. Collins, Jr., New York, N. Y., on the brief), *for intervenor.*

MEDINA, *Circuit Judge*:

Schwarzenbach-Huber Company, a textile manufacturing concern with its principal place of business in New York City, petitions this Court to review and set aside an order of the National Labor Relations Board and the Board cross-petitions for enforcement.

This case presents a sequence of events in a familiar pattern. The Textile Workers Union of America AFL-CIO

used what is now commonly called the "representation" card method of obtaining the support of a majority of the production and maintenance workers in the Company's Juniata plant in Altoona, Pennsylvania. Claiming to have cards signed by a majority of the workers in the unit, the Union by letter of February 9, 1967 demanded a recognition of the Union and immediate collective bargaining. On February 13, 1967 the Union filed a petition for an election. On February 14, 1967 the Company by letter expressed its doubt that the Union represented "most or many" of its employees in the unit. The letter also joined in the Union's request for an election. On March 16, 1967 the election was held and the Union lost by a substantial margin. Thereafter proceedings were instituted by the Union to set the election aside, to establish various alleged unfair labor practices by the Company and to order the Company, without any new election, to bargain with the Union. These proceedings were consolidated; and, after a hearing and findings by the Trial Examiner, the Board set the election aside, held the Company's doubt that the Union had a majority was not a good faith doubt, sustained *in toto* all the claims of unfair labor practices; and, finally, on the ground that the unfair labor practices were so outrageous and pervasive as to dissipate the Union's majority prior to the election and that they made any new election in the foreseeable future impracticable, the Board ordered the Company to bargain with the Union.

We hold that neither on February 9th nor at any time prior to February 14th did the Union have in its possession valid cards signed by a majority of its production and maintenance employees. We set aside as not supported by substantial evidence on the record as a whole the finding that the Company's doubt that the Union had in its possession cards signed by a majority of its production and

maintenance employees was not a claim made in good faith. We sustain the Board's finding of two of the alleged unfair labor practices. As to the other findings of alleged unfair labor practices, we set them aside and refuse enforcement on the ground that such findings of unfair labor practices are not supported by substantial evidence on the record as a whole. We set aside and refuse to enforce the bargaining order as the Union did not have a majority, as the Company's doubt that the Union had a majority was made in good faith and as the making of a bargaining order under the circumstances of this case would clearly not effectuate the purposes of the Act.

Part I

The Bargaining Order.

The propriety of enforcing an order to bargain after a union has lost a representation election depends on the resolution of three questions: (1) whether the Union in fact had a majority; (2) whether the employer refused to bargain because of a good faith doubt of such majority, if the Union had a majority; (3) whether on all the facts of the election situation a bargaining order is an appropriate remedy for enforcing the policy of the National Labor Relations Act.

A

Did the Union Have a Majority?

The initial inquiry must, of course, relate to the number of employees in the unit. The Trial Examiner, all of whose findings were adopted by the Board, finds the unit was composed of 197 employees. This included Joan Iaia and

Ruby Evans, to the inclusion of whom, says the Trial Examiner, the General Counsel "takes no serious exceptions." Indeed, there was no basis for any objection whatever, as these two women were classified as weavers, they spent most of their time on the floor operating the looms and only a part of their time teaching the others how to operate the looms. The name of Marjorie Krise is apparently omitted, as her name "does not appear on the eligibility list as prepared by the Company for the March 16 election." Mrs. Krise should have been included in the unit. The uncontradicted evidence is that she and her husband had worked in the plant for a long time. In November, 1966 she told the Company "I'd like a layoff for medical and personal reasons." While she considered her personal health a private matter, there is other evidence in the record to indicate that the layoff was due to an allergy she had for silk and silk was then being worked in the plant. In February of 1967 her husband noticed that certain jobs were indicated on the Bulletin Board and she told him that she was interested in going back to work and would he see Mr. Kozak, the Personnel Manager. He saw Mr. Kozak who said he would be glad to see her. This was reported to Mrs. Krise. She saw Mr. Kozak and went back to the plant on February 20th. She had previously worked as a creeler but came back in a different department as an examiner, clearly within the category of a production or maintenance worker. If the fact that her name was not on the eligibility list has any significance, it is sufficient to say that the eligibility list was prepared as of the period "ending February 11, 1967," prior to the time when Mrs. Krise came back to work. As the name of Joyce Jewell, who quit work after the preparation of the eligibility list, was eliminated, it is clear that the name of Marjorie Krise should have been included.

Thus the unit becomes 198. The name of Vivian Becker, who was a regular worker but who was laid off temporarily in the early part of February because she had to find a new babysitter to take care of her children while she worked, should also have been included. This brings the total in the unit to 199.

The next consideration is the cut-off date. The Board concedes in footnote 20 on page 23 of its brief that "it does not rely on cards signed after February 14."[1] The Trial Examiner does not clearly state the fact that on February 9th, when the initial demand for recognition was made, the Union did not have a majority. But he finds that between February 9th and February 14th "4 additional employees signed representation cards," and he says the Union thus "obtained a majority of 103 cards out of a total of 199 unit employees, even assuming that Becker and Krise are to be included in the unit." This is on the theory that the Union's demand was of a continuing nature.

We hold that under the circumstances of this particular case the cut-off date is February 9, 1967, when the letter claiming a majority was sent by the Union. Since we find, as is disclosed in the ensuing discussion, that the Union had no majority on February 9, 1967, a compelling reason for

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1 This "concession" seems to imply that cards "signed" on or before February 14 should be counted. Of course, the date of the signing of the cards has no significance. Many of the employees signed cards and retained them at home or in their pockets or elsewhere for periods of several days, as appears in the Appendix to this opinion. They did this, we have no doubt, because they had not yet made up their minds to make the cards effective by delivering them to the Union. The significant date is the date on which the signed card is delivered to the Union.

Moreover, in no event could cards delivered to the Union on February 14 be counted, as the Board itself has ruled that the cut-off date cannot be later than the day before the date of the refusal to bargain. *Gotham Shoe Manufacturing Co.*, 149 N. L. R. B. No. 80, *enforced*, 359 F. 2d 684 (2d Cir. 1966).

this ruling is afforded by the fact that Frazier directed a wholesale distribution of copies of this letter at the plant gates on February 10. The intended effect of this widespread diffusion of the Union's false claim that it had a majority was undoubtedly to bring the reluctant sheep into the fold by telling them the fight was over, the Union had won and they might as well get on the bandwagon. No cards handed to the Union after the making of such a misrepresentation could possibly be deemed valid.[2]

We turn to the cards. During the oral argument of this case we made a request that the cards be sent to us. When they arrived they had been thoroughly shuffled and scrambled. It did not seem possible to arrange them in a meaningful way. But continued study of what appeared on the face, and what appeared also on the reverse side of each card, finally led to a solution which perhaps we should have noted in the beginning. The key to the cards is to be found in the symbol appearing on the reverse side of each card on the right near the top. When these cards are arranged in sequence from 1 to 122, in accordance with the symbols appearing on the reverse side of the cards, we can get a completely dependable factual pattern of the order in which the cards were counted. So that this may be checked by any interested person, we have added as an Appendix to this opinion a complete list of the 122 cards, arranged in the order just above described, together with the data appearing both on the face and on the reverse side of each card, including the date and time of filing with the Board.

The Examiner finds that the 4 additional employees above referred to are represented by cards numbered 101,

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2 See *N. L. R. B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179-180 (2d Cir. 1962); *N. L. R. B.* v. *H. Rohtstein & Co.*, 266 F. 2d 407 (1st Cir. 1959).

96, 100 and 102 and he thus reaches the erroneous conclusion that the Union had 103 cards on February 14, 1967. Card No. 96 is particularly interesting. It is the card of Helen McKendree. The date is "2 1967." It was received at the plant gate on February 10, 1967 at the very time that copies of the Union's letter claiming a majority were being distributed. But it is erroneously given the number 96. It could not properly be counted as constituting one of the majority referred to in the letter of February 9th as the card was not received by the Union until February 10th. By some strange method of computation the Hearing Examiner counted this card as one of the "99 cards" he says were held by the Union at the time of the demand. And he counted this card again as one of the "4 additional employees." The correct number of cards in the possession of the Union on February 9, 1967 was 98.

The other 3 supposedly "additional" cards are also interesting. Card No. 100 was signed by Maury L. Delozier on February 13 but it was not delivered to the Union until February 21. This is after the cut-off date, so we still have only 98. Card No. 101 was signed by John [redacted]ncone on February 14 and delivered to the Union on the same day. This was too late; we still have 98. Card No. 102 was signed by Calsie D. Gearhart on February 11 but was not received by the Union until February 13, after the cut-off date of February 9, 1967.

Accordingly, we are compelled to conclude that on the cut-off date of February 9th the Union did not have a majority. And this remains true even if Krise and Becker are not included in the unit.

B

Are Many of the Cards Vitiated by Deceitful and Fraudulent Misrepresentations by the Union?

The chief professional union organizer was Carl Frazier, an International Representative of the Textile Workers Union. Working as his lieutenant and next in command was James Meyers. 35 cards were signed at the meeting of January 29, 1967. A few were signed at later meetings sponsored by the Union. Most of the cards were obtained by personal solicitation, which varied from visits to the homes of the workers to the passing out of the cards with or without an explanation of their purpose.

A very considerable number of those who signed the cards testified at the hearing. The result, however, was that the Trial Examiner counted all 122 cards which he characterized as "an overwhelming majority." The way this was done can be described as nothing short of extraordinary. Relying on *Cumberland Shoe Corp.*, 144 N. L. R. B. 1268 (1963), *enforced*, 351 F. 2d 917 (6th Cir. 1965) and *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950), the Trial Examiner held that unless a card signer had been told that the "sole" or "only" purpose of the card was to obtain an election, the signing of the card was a sufficient demonstration of an intention to appoint the Union as bargaining agent and that there was thus established an irrebuttable presumption which could not be neutralized by any testimony by the employee as to what he or she understood by the various representations made by Frazier or the other Union solicitors. In one or two instances where the testimony indicated that the representation was that the "sole" or "only" purpose of the cards

was to get an election, the Trial Examiner accepted these cards also, as he found the testimony not credible.

We turn first to the 35 cards signed at the meeting of January 29th. Frazier himself testified that he read the entire printed matter on the card, word for word, and that he made the following representations at the meeting of January 29, 1967: (1) if the Union lost the election the cards would be returned; (2) that the Union must have 30 per cent "of the people" before the Union can petition for an election; (3) "there has to be 51 per cent of the people vote for a Union." There was considerable testimony by employees to the effect that they were told that by signing the cards they would save $5. This seems to have been on the theory that, as no payment whatever was necessary to validate the card, they would save the payment of the initiation fee or dues generally required. What Frazier omitted to tell those present at the meeting is similarly established by Frazier's testimony that he did not tell those present that, even if the Union lost the election, it could still demand recognition and the right to bargain upon the basis of the cards. That he knew this to be so is clear from his testimony that, while he made no such statement at this particular meeting, he did make such a statement at other meetings. We think these flagrant misrepresentations and this wilful omission were deceitful and that the effect of making them was to perpetrate a fraud on those present at the meeting who signed the cards.

While none of the employees was permitted to testify to what these misrepresentations meant to him, we think the inference is perfectly plain. Each man present at the meeting must have concluded: "we employees are not accepting Union membership unconditionally. If there are enough cards to get an election, and an election takes place, I can

vote for the Union or against the Union as I choose. And, if the Union wins, I save $5. If the Union loses, that is the end."

Frazier was especially emphatic in insisting that he had never said to anyone, at the meeting or anywhere else, that the "sole" or "only" purpose of the cards was to obtain an election.

Thus because of these flagrant misrepresentations and this wilful concealment, we have no alternative other than to invalidate the entire 35 cards signed at the meeting of January 29th.

Against this background it is, we think, of no significance that none of the signers of any of the cards demanded the return of his card by the Union. The *ex parte* action of the Union in sending union membership cards and union literature to each person who signed a card is likewise of no significance in the light of the representations made by Frazier.

To cover the matter of the cards more thoroughly we specifically invalidate the cards of six employees. Three of these, Jonas Corbin, Jr., William Slone (whose card was erroneously recorded by Frazier as Stone) and Walter Delozier, attended the meeting on January 29, 1967. The other three, William Nolan, Ronald Taddy and Patrick O'Hara, so far as appears, did not attend the meeting of January 29, 1967.

Jonas Corbin, Jr. was an active supporter of the Union who, after signing his card at the meeting, distributed cards to other employees and urged them to sign for the Union. He was asked what Mr. Frazier said at the meeting:

> A. Mr. Frazier said that the cards were—that we were signing the cards so that we could get an election down at the plant.

Q. Did you ask any questions? A. Yes, sir.

Q. What was the question you asked? A. I asked why, I asked why it said on the card that we were signing to become a member of the Union; I asked whether we were actually a member of the Union, were they going to collect dues from us if the Union wasn't voted in and Mr. Frazier then told me, he said, "No, you will get your card back if the Union isn't voted in."

Q. Did he answer your question in any other way? A. To the best of my recollection, all he wanted was to get 30 per cent of the cards signed, 30 per cent of the people to sign blue cards so we could get an election.

He also testified that after the meeting as people were picking up and signing the blue cards, "the word came to me" that the people signing before the election "would save five bucks."

His understanding of what the cards meant is demonstrated by his statement, in turn, to those ten people to whom he distributed cards:

Q. Did you tell them anything about the purpose of the cards or what they meant? A. I told them that we had to sign 30 per cent of the people in the plant before we could even get an election and get the thing over with one way or another.

Clearly, the expectation that Corbin generated and that Frazier had generated in Corbin was that there would be an election to "get the thing over with one way or another." If the Union lost, the cards would be returned and no dues would be owed; if it won, an early signing would have saved five dollars. Signing the cards was meant to bring an election. To gain signatures by telling the employees

that there would be an election, without also telling them that the cards alone might be used to gain representative status, is a sufficient misrepresentation to invalidate the cards. When the employees were told, in effect, that they had nothing to lose by signing and could, by signing, save money and get an election to "get the thing over," this indicates that there was no intention to unconditionally authorize the union as the representative of the workers.

William Slone attended the meeting and signed his card there. He testified that at the meeting "they said they needed 30 per cent of the cards to have an election," also that by signing the card the initiation fee would be saved. He specifically remembered Frazier stating: "if the Union was not voted in, that these cards would be returned to you in the mail." In obvious reference to the election, he recalled that Frazier had said: "We need cards to get the ball rolling."

Walter Delozier recalled that when Frazier was asked at the meeting about the language on the cards that says "you belong to the Union when you sign it," he replied: "This is just to get the show on the road, so we can get a vote in your plant." When pressed on cross-examination he recalled an even stronger statement:

> Q. What did Joness (sic) Corbin say at the meeting that you attended? What questions did he ask Frazier? A. He stood up and said, "I have a question" and he said, "O.K.," and he said, "Is this card just to get a vote in the plant or company?" He said either one, I don't know which.
>
> Mr. Frazier said, "Yes, it is." But it doesn't say that on the card. Then he explained that it only takes 33 per cent of these cards to get a vote and the question was dropped right there.

As Delozier testified succinctly: "I read the card but I took Frazier's word."

When we turn to the testimony of employees who did not sign at the meeting of January 29, 1967, we find the same pattern of misrepresentation, half-truth and evasiveness by the Union organizers.

William Nolan had signed a card at his home. When asked what Harry McGraw, who had given it to him, said, he replied:

> A. He said they had to have a certain percentage to join the Union, to get a Union started.
>
> Q. Did he say anything about an election? A. Yes, he said there would be an election.

He also recalled that he had been told that the Union needed 30 per cent of the cards to get the Union started and bring about an election. The single, positive representation that there would be an election, without any indication that cards alone could bring in the Union without or despite an election, is sufficient to invalidate this card.[3]

Ronald Taddy was given a card by James Meyers, Frazier's assistant. When he asked Meyers about the card, Meyers replied that they had to have 30 per cent to have an election. When pressed on cross-examination, as to whether he had been told that signing the card "would help you get the Union," he replied instead that "It would help us get an election." He testified that Meyers had said nothing to him about dues but that "it was rumored around the mill—" and then he was cut off.

Patrick O'Hara was told:

> A. Well, it would save you the first year's fee and that they would use the card to get the majority of the

3 *N. L. R. B.* v. *S. E. Nichols Co.*, 380 F. 2d 438 (2d Cir. 1967).

> cards signed, you know, but it was to get a vote going in an election.

Guella, also told him that the first year's fee was five dollars, and that "the purpose of the card was to have enough cards to get a vote." When he was asked if he had ever asked for his authorization card back, he responded:

> A. No, I didn't. May I ask one thing? I was under the understanding when I received—.

He was not permitted to testify to his understanding but from the testimony in the record, it is clear that he like the others thought that signing the card would bring an election and, if the Union succeeded in the election, would save dues for a year.

We specifically invalidate the cards of Jonas Corbin, Jr., William Slone, Walter Delozier, William Nolan, Ronald Taddy and Patrick O'Hara.

We do not find in the testimony of these witnesses the "conglomeration of self-contradictions and inconsistent statements" to which the Trial Examiner makes reference. On the contrary, the testimony of these witnesses is clear and entirely consistent with the testimony of Frazier as described in Part I B of this opinion.

C

The Aftermath and the Balance of the Cards.

As the Board in its brief, footnote 20 on page 23, states: "the Board does not rely on the cards signed after February 14," no explanation is required of the large number of cards that came into the possession of the Union thereafter. But the Hearing Examiner counted all 122 cards. So, for the sake of completeness, we shall go into the question of how the Union procured this large number of cards.

It will be recalled that, despite the demonstrable lack of a majority on February 9, the Union distributed at the plant on February 10 copies of the letter of February 9 asserting the Union's false claim that it possessed a card majority on February 9. The effect of this additional misrepresentation is shown in the Appendix. Indeed, this new maneuver worked so well that the Union on March 3, 1967 mailed the following letter (Respondent's Exhibit 22-a) to each employee who had not already signed a card:

TEXTILE WORKERS UNION OF AMERICA
Affiliate of the AFL-CIO and CLC
1060 Broad Street
Newark 2, N. J.

March 3, 1967

Dear Friend:

We have just received the complete list of Schwarzenbach-Huber employees from the Labor Board. According to our records, you have not signed a Textile Workers Union Membership Authorization Card.

We regret that we could not write to you sooner because our mailing list was not complete.

With the Secret Ballot Election just a few days away, we want to take this opportunity to invite you to join with the *MAJORITY* of your co-workers who have already signed Union cards.

The Textile Workers Union and your TWUA Local UNION is open to all Schwarzenbach-Huber employees. The TWUA is here to help all Schwarzenbach-Huber workers—not just a select group.

Even though we are confident of victory, since a *MAJORITY* have pledged to support our Union—you

know as well as we know that a big Union vote will mean a strong local union at Schwarzenbach-Huber—which will result in *HIGHER WAGES, MORE BENEFITS* and *BETTER WORKING CONDITIONS* for *YOU, THE WORKERS!*

Be a chartered member before the election—please come to the planned rally that will be held before the election.

REMEMBER—"IN UNITY THERE IS STRENGTH"

Fraternally yours,

/s/ CARL E. FRAZIER
Carl E. Frazier, Int'l Representative

D

The Law.

It may be doubted that the courts deciding *Cumberland*[4] and *Joy Silk*[5] ever intended the rules enunciated in those cases to be applied "so woodenly" as the Board did in this case and others, to use the expression of Judge Wisdom in *N. L. R. B.* v. *Southland Paint Company*, 394 F. 2d 717, 725 (5th Cir. 1968). See the reinterpretation of *Cumberland* by the Sixth Circuit in *N. L. R. B.* v. *Swan Super Cleaners, Inc.*, 384 F. 2d 609 (6th Cir. 1967). In any event this *per se* approach has been very generally criticized[6]

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4 *Cumberland Shoe Corp.*, 144 N. L. R. B. 1268 (1963), *enforced*, 351 F. 2d 917 (6th Cir. 1965), *supra et passim.*

5 *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950), *supra et passim.*

6 See Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851 (1967); Comment, *Refusal-To-Recognize Charges under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. Chi. L. Rev. 387 (1966); Note, *Union*

and the rulings of these two cases have suffered much erosion.[7] In this Circuit the *Cumberland* rule has been rejected. *Bryant Chucking Grinder Co.* v. *N. L. R. B.*, 389 F. 2d 565 (2d Cir. 1967) concurring opinion of Judge Friendly, at page 569, citing *N. L. R. B.* v. *S. E. Nichols Co.*, 380 F. 2d 438 (2d Cir. 1967).

The *Nichols* rule, at page 444, is succinct and comprehensive:

> The decisive question is whether the employees "meant to make the Union their representative" or instead "understood the cards not to be votes for the Union" but rather requests "that an election should be called at which they would vote for or against the Union as they then pleased."

And again, at page 445:

> Employees * * * who were willing to be represented by a union if the employer acquiesced on a showing of a majority might well not cavil over the union's being able to force recognition without an election if the

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Authorization Cards, 75 Yale L. J. 805 (1966). See also, R. Winter, *Judicial Review of Agency Decisions: the Labor Board and the Court* in 1968 The Supreme Court Review 53 (P. Kurland ed. 1968).

7 See, e.g., *N. L. R. B.* v. *Texas Electric Cooperatives*, 398 F. 2d 722 (5th Cir. 1968); *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998 (4th Cir. 1968); *N. L. R. B.* v. *Lenz Co.*, 396 F. 2d 905 (6th Cir. 1968); *N. L. R. B.* v. *Southland Paint Co.*, 394 F. 2d 717 (5th Cir. 1968); *N. L. R. B.* v. *Lake Butler Apparel Co.*, 392 F. 2d 76 (5th Cir. 1968); *N. L. R. B.* v. *Arkansas Grain Corp.*, 390 F. 2d 824 (8th Cir. 1968); *N. L. R. B.* v. *Dan Howard Mfg. Co.*, 390 F. 2d 304 (7th Cir. 1967); *Crawford Mfg. Co.* v. *N. L. R. B.*, 386 F. 2d 367 (4th Cir. 1967), *cert. denied*, 390 U. S. 1028 (1968); *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir. 1967); *N. L. R. B.* v. *Swan Super Cleaners, Inc.*, 384 F. 2d 609 (6th Cir. 1967); *N. L. R. B.* v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851 (1st Cir. 1967); *Engineers and Fabricators, Inc.* v. *N. L. R. B.*, 376 F. 2d 482 (5th Cir. 1967); *Bauer Welding and Metal Fabricators, Inc.* v. *N. L. R. B.*, 358 F. 2d 766 (8th Cir. 1966).

> employer did not. It is quite a different matter to permit a union to attain recognition by authorization cards procured on the affirmative assurance that there would be an election without a further clear explanation that the cards can and may also be used to obtain recognition without any subsequent expression of preference by the employees; such a half-truth gives the employees the false impression that they will have an opportunity in all events to register their true preferences in the secrecy of the voting booth.

This would also seem to make it improper in cases to come before us in this Circuit to exclude evidence of understanding and intention as held in *Joy Silk*. Thus, whether an ambiguity appears on the face of the card, or as the result of a statement made by the union solicitor, and in all cases of misrepresentation and omission such as we have in this case, the burden rests on the General Counsel to establish by a preponderance of evidence that the signer of the card intended to do more than merely to indicate his desire that there be an election to decide whether or not the Union should be the bargaining representative of the employees in the unit. See *N. L. R. B.* v. *Peterson Brothers, Inc.*, 342 F. 2d 221, 224 (5th Cir. 1965). Without such proof the cards subject to such infirmities must be discarded as invalid.

The cases indicate that the cards used by the various unions are worded differently. Some of them, as mentioned by our Brother Friendly in a footnote to his opinion in *Nichols*, 380 F. 2d at page 442, contain in the printed matter a statement that the signer of the card accepts membership in the Union. Such a statement appears on the cards used by the Union in this case. In the context of the misrepresentations and omissions by the Union representatives and

solicitors in this case we think the precise wording of the printed matter on the cards cannot change the result in those instances where we have invalidated the cards.

E

Was the Company's Claim That the Union Lacked a Majority Made in Good Faith or in Bad Faith?

From the background we have already sketched it would seem that any doubt concerning the Union's majority would have been clearly justified as made in good faith. It was Brooks Taylor, the plant manager, who wrote the letter of February 14th, in which it was stated that the Company doubted the Union's majority status as asserted in its letter of February 9th. This letter was prepared after consultation with the Company's counsel in New York who either supplied the wording of the letter or the contents before it was written.

In the part of his decision stating his reasons for rejecting the Company's claim of a good faith doubt that the Union had in its possession cards signed by a majority of the employees and could prove it, the Trial Examiner quotes the following excerpt from Taylor's testimony:

> Q. Isn't it true that you received General Counsel's Exhibit No. 8 [the Union's demand letter] on February 10, Friday? A. I believe so, yes.
>
> Q. What was the first thing you did when you got that letter? Didn't you contact your attorney in New York? A. Probably, yes.
>
> Q. I show you General Counsel's Exhibit No. 9, which is a letter signed by you written to the Union dated February 14, 1967, and ask you that isn't it true that your attorneys either gave you the wording or the contents of that letter before you wrote it? A. Yes.

One would suppose that this indicated disapproval by the Trial Examiner of the seeking of legal advice by an employer. But the Board, in footnote 1 to its decision, says:

> Respondent asserts in its brief that the Trial Examiner relied on the fact that the Respondent consulted its attorney before replying to the Union's request for bargaining in finding that Respondent had no good-faith doubt of the Union's majority status. We do not believe that the Trial Examiner relied on the fact that Respondent consulted its attorney, nor do we.

This is not the first time this has happened. We wish to make it plain that employers as well as unions have a perfect right to consult their lawyers. That is what lawyers are for. If consultation with counsel indicates anything, it shows a desire to conform with legal requirements, to obey the law. It is quite reprehensible and wrong to insinuate, or to imply or to state that an adverse or damaging inference or deduction is to be made from the fact that an employer consults his lawyer in connection with any matter involving the relationship between an employer and his employees or a Union or in connection with any labor dispute or controversy.

To back up his contention that the Company's doubt of the Union's majority status was genuine Taylor testified to a number of significant circumstances that had come to his attention, some of which were hearsay. As he was testifying to his own state of mind, this hearsay was clearly admissible. Thus he said that he heard the Union started organizing not in late January, as asserted by the Union, but in October or November, passing out a pamphlet which had a detachable card on the back that persons could cut out and return to the Union expressing their interest. He

also heard of meetings on Sunday afternoons in November and December but heard there never were more than 17 present and the earlier effort seemed to have died down. He heard about the meeting in late January and thought there were about 35 to 40 persons there, most of whom signed cards. As he calculated, adding this number to the 17 who had attended meetings in November or December, would bring it up to about 45. This was an inconsiderable number in view of the size of the unit. He also testified that the Company had many older employees who had been with the Company at the time this very Union had gone through prior elections, which the Union had always lost. He also testified that he heard that cards were being signed by employees just "to get people off their backs" and he did not feel that they were signing "without this pressure on them."

Taylor's doubt was not rejected because the Trial Examiner did not believe him. Indeed, his testimony was direct, responsive and frank, so far as we can tell from the record. The rejection by the Trial Examiner of the Company's alleged good faith doubt seems to be based on some theory of punishment for the alleged unfair labor practices which, even though most of them happened after the period February 9—February 14, are supposed to evidence a determination "to gain time in which to dissipate that majority." A finding based upon any such theory cannot stand. Moreover, the Trial Examiner erroneously placed the burden of proof to "demonstrate the good faith required to justify his failure to bargain" upon the Company.[8]

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8 *Lane Drug Co.* v. *N. L. R. B.*, 391 F. 2d 812 (6th Cir. 1968); *Textile Workers Union* v. *N. L. R. B.*, 386 F. 2d 790 (2d Cir. 1967); *N. L. R. B.* v. *River Togs, Inc.*, 382 F. 2d 198 (2d Cir. 1967); *N. L. R. B.* v. *Great Atlantic & Pacific Tea Co.*, 346 F. 2d 936 (5th Cir. 1965); *Hercules Packing Corp.*, 163 N. L. R. B. No. 35 (1967); *Aaron Bros.*, 158 N. L. R. B. 1077 (1966).

These alleged unfair labor practices will be discussed in detail later in this opinion. It will suffice to say now that we find most of them not supported by substantial evidence on the record as a whole. The two that we do sustain and will enforce relate to the Clyde Brown incident which happened on February 21st and the formation of the Committee in violation of Section 8(a)(2) which took place after the election.

That the Board's rejection of the Company's good faith doubt finds no substantial support in the record as a whole is further demonstrated by some of the reasons given by the Trial Examiner for rejecting it.

On February 2nd Walter Delozier, Rodger Trotter and Donald Craig came in and told Taylor that many employees were signing cards because they were tired of being pressured both at work and at home to sign the cards and because they were tired of listening to pro-Union and anti-Union discussions at every turn. On the advice of his counsel Taylor made a memorandum which is Respondent's Exhibit 5, signed by him and also signed by Delozier, Trotter and Craig. A somewhat similar memorandum is Respondent's Exhibit 6 dated February 7th. These memoranda are given no weight by the Trial Examiner because they are "largely self serving" and because they are not corroborated by the employees "who supposedly were so pressured." The fact that the memoranda, prepared on the advice of counsel to serve as corroboration and to refresh Taylor's recollection, are self serving is a strange sort of objection. Of course, they are self serving and their validity depends only upon Taylor's credibility, which is unquestioned on the point of good faith and which is corroborated by the signatures of Delozier, Trotter and Craig. At least as to the signature of Walter Delozier this can be compared

with the signature on his card. Moreover, there is ample testimony in the record that pressure was brought to bear on many of the employees.

The Hearing Examiner adds as a further reason that the employee witnesses produced at the hearing had been first interviewed by counsel for the Company only a few days before the hearing. The Trial Examiner evidently thought that counsel should have interviewed the employees some time in February or March. Had he done so, it is easy to imagine that this would have been alleged as another unfair labor practice. This is just another instance of the "damned if you do, damned if you don't" approach by the Board that we criticized in *N. L. R. B.* v. *Dorn's Transportation Company, Inc.*, decided January 9, 1969, Slip Sheet p. 863 at p. 878. Moreover, when the interviewing was done, scrupulous care was taken to advise the persons interviewed that they were not required to answer the questions if they did not wish to and that whatever they said would have no effect whatever on their continued employment.

A further argument on the good faith issue is that the Union in its letter of February 9, 1967 offered to prove it had a majority and the Company did not accept this offer. A similar argument is found in Board rulings and court opinions in many cases of the same type as the one before us. We hope this opinion will help to expose the unreality and complete futility of such alleged offers to prove possession of a card majority. Of course the Union does not mean that it proposed to let the employer see the original cards and do its own counting. If the Union had meant to propose a cross-check by the employer, it would have said so. If what is meant is to submit the cards to some impartial person for a count, where could such a

person be found with the requisite knowledge and experience to make a proper count, in view of the fact that the count as made by the Board itself was full of errors, miscalculations and ambiguities, as we have already demonstrated? How would the impartial person, perhaps a priest, a minister or a rabbi, know whether to go by the dates on the face of the cards or the dates on the back? How would he know the correct number of persons in the unit? If he counted as of February 9, 1967, which is the most natural date to select, he would come out with the answer that the Union did not have a majority. Above all, how would he know what representations had been made, and what relevant factors had been concealed by the union organizers? The whole thing is absurd. The plain truth of the matter is that the offer of proof is of no consequence whatever in this case. The employer had no alternative other than to disregard it.

While the Trial Examiner concludes that the asserted reasons for withholding recognition "have no basis in fact," we are of a contrary view.

F.

Is the Bargaining Order in This Case an Appropriate Remedy for Enforcing the Policy of the National Labor Relations Act?

What do all these miscalculations and errors of fact and law by the Board add up to? Surely they do not support the widely held supposition that the Board and the Trial Examiners have a special expertise to handle this type of case. This "representation" card business is an abomination. As presently administered it is a pro-Union device that serves no other purpose than to afford a method by which elections can be by-passed and the Unions ushered

in without giving the employees individually or collectively any voice in the matter. And this is accomplished by the invention of new *per se* rules of evidence and new standards by which the proofs are to be evaluated, that fly in the face of common sense and elementary concepts of justice and fair play.

The very keystone of the Act is Section 7.

> Rights of Employees
>
> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

The invention and implementation of a scheme by which employees can be befuddled into thinking they are asking for a free election at which each can cast a secret ballot either for or against the Union, whereas they are in fact held to be signing away this very right without knowing they are doing so, seem to us to be a clear violation of Section 7. By the same token the bargaining order in this case nullifies the beneficent purposes of the Act and in no possible way can be said to effectuate the purposes of the Act. The forgotten man seems to have been the employee who was one of those who comprised the unit of production and maintenance workers in the Company's Juniata Plant.

Part II

The Unfair Labor Practices.

We sustain and will enforce the Board's finding of a Section 8(a)(1) violation for having reprimanded employee Brown for Union activities during working hours, and we also sustain and will enforce the Board's finding of a Section 8(a)(2) and (1) violation for establishing, and then dominating and supporting the Employee Committee after the election. We set aside and refuse to enforce all the other findings of unfair labor practices by the Company as not supported by substantial evidence on the record as a whole. Each of these findings will now be discussed in some detail.

A.

The Meetings With Small Groups of Employees.

Some weeks before the election, and with the election in mind, the management of the Company decided to hold a series of meetings with small groups of the employees, sometimes with 5 to 7 employees, sometimes with as many as 8 to 10 employees in attendance. The issue is whether or not the discussions at these meetings interfered with, restrained, or coerced the employees in the exercise of their Section 7 rights.

In this Circuit the controlling authority is *Bourne* v. *N. L. R. B.*, 332 F. 2d 47 (2d Cir. 1964), where we held, at page 48: "Under our decisions interrogation, not itself threatening, is not held to be an unfair labor practice unless it meets certain fairly severe standards." Five factors are frequently relevant: (1) whether there is a record of employer hostility; (2) is the information such as to have a potential use against an individual employee; (3) the

identity of the questioner; (4) is there unnatural formality in the place and manner of interrogation; and (5) the truthfulness of the replies.

Before applying these standards it is well to bear in mind that the meetings with small groups of employees were dialogues rather than interrogations. What management was trying to accomplish had a double aspect: (1) to ascertain from the employees what their gripes and complaints were; and (2) in the context of a discussion of what the employees thought the Union could do for them in the light of these complaints, to counter the arguments put forth by the Union in its books and pamphlets and by word of mouth. The employees had no reluctance to voice their complaints. Indeed, in many instances these were stated with some enthusiasm. Randy Thompson, one of the members of the Union Committee and a strong Union supporter, testified that the method pursued by Taylor was to read from a book that had been passed out at the gate by the Union "something about the booms are dropping," and then comment on what he had read in order to give the Company's point of view on the particular subject covered by the quotation. Naturally and properly the Company took the position that the employees should cast their secret ballots for the Company and against the Union. Under these circumstances, assurances against reprisals would have been wholly inappropriate. Moreover, the fact that the discussions were held with small groups rather than with individuals is a further support for the Company's position.

We proceed to apply the *Bourne* standards:

(1) In this case there is no record whatever of hostility to the Union.

(2) There were no threats, direct or indirect, to discharge any employee nor was any employee discharged. Indeed, we can find nothing in this record to support the view that any of these dialogues was designed to probe for information that could be used against any of the employees. There was no grant of benefits to the employees.

(3) Those who conducted these discussions varied, generally Taylor, the Plant Manager or Vice President Elden or both were present. Lewis and Rabenstein were also present at some of the meetings. Lewis was the training manager and foreman of the third shift. Rabenstein was standards engineer and responsible for the "method time measurement" system. Both were properly found by the Board to be supervisors. Taylor, Lewis and Rabenstein were in constant day-to-day contact with the employees, Elden also but to a lesser degree. There is no indication that any one of these three appeared as a formidable personality who was held in awe by any of the employees. The discussions appearing in the record seem to have proceeded on the part of the employees in a natural and quite candid and uninhibited way.

(4) As above indicated the dialogues proceeded in the most informal manner. But the place where they were held was the subject of extended testimony and discussion at the hearing. This was because the Union was trying to make it appear that the room had the stamp of high-level management and discipline upon it in such fashion as to overawe the employees. While in one sense this room could be called the conference room, this is only because there was in it a conference table surrounded by 8 chairs. In fact the employees were constantly in and out of this room, as it contained the desks of Grossman and Kozak, a sick

room or dispensary, the Xerox machine and certain files. It seems to us that the only reason this room was chosen for the meetings is that it was the most convenient room in which to hold such discussions. This was a familiar and reasonably quiet area and it was certainly not a clearly demarked, seldom-entered management province.

(5) The truthfulness of the replies to questions is supposed to indicate the fear or lack of fear or inclination to evasion experienced by the employee. Here the readiness of the employees to discuss their gripes dispels any notion of fear. The whole atmosphere is epitomized in employee Melvin Kintz, Jr.'s testimony that, at one of these meetings he was asked why he needed a union to speak for him since he spoke so well for himself, and he replied that it didn't matter how well he spoke for himself if nobody in authority would listen.

The finding of interference, restraint or coercion of employees by these group meetings is wholly unsupported by substantial evidence on the record as a whole. Indeed, unless an employer can in some such fashion as in these group meetings put its side of the case before its employees just prior to an election, the Union with its professional organizers such as Frazier and Meyers, and its books, leaflets and pamphlets, would have the field to itself.

B.

The Alleged Threat to Close the Plant.

This is the most serious and the closest issue before us. Schwarzenbach, the President of the Company, had not, at least for some years, addressed his employees. In what he had every reason to suppose was a critical hour he ad-

dressed them in several shifts a few days before the election. Here are some excerpts from his speech:

> To say I am concerned about the future of the mill is putting it mildly.
>
> That he had invested a lot of money in the plant, that he could easily sell it or lease it to a company like Sylvania.
>
> That it was an old company, which had been in the area for a long time, that the plant had gotten along without a union, and that if the Union got in or failed to get in "they were going to try to make a go of it either way."
>
> A few employees testified that Schwarzenbach said he would try to keep the plant going if the Union won, but he didn't see how he could do it.

Schwarzenbach also made reference to the permanent closing in 1953 of the Altoona Rayon plant.

On March 2, 1967 the Company issued to its employees a single-sheet cartoon showing a sketch of its Juniata plant with the following in large print:

> We have, here in Altoona, one of the finest textile mills in the world . . . South Carolina not excluded. (Don't let's wreck it now!)

Below this heading is a sketch of a plant in ruins, with the subhead: "Remember Altoona Rayon?"

The gist of what remains to support this charge of threatening to move the plant is contained in the following quotation from Schwarzenbach's letter of March 9, 1967 to the employees:

> No matter what the TWUA may promise you, the Juniata record is a darn good one. Compare your

wages, your holidays, your benefits, to industry figures, *to those in our own Front Royal mill for that matter!* Look at Juniata's 20-year record of around-the-clock employment. And the TWUA? *Why isn't there a single major textile operation left in the northeastern states?* Is that the kind of job security the union keeps talking about?

Why is it that today virtually all our competition is located in the South? Simple enough! The mills down there feel safe from the bickering, dissension and unreasonable demands that come with the TWUA. *Remember Altoona Rayon?*

Virtually all of Stehli's fabric requirements now are being woven down south. These are fabrics which for many a year were mounted on Juniata looms. Those same southern mills are just waiting to supply Mr. Hommel with every yard of computer fabric he requires. *For Juniata there is no alternative but to again become competitive.* (Emphasis in original.)

It was stipulated that Altoona Rayon had closed its plant permanently in 1953 while under contract with the Textile Workers Union of America, the Union involved in this case.

There are occasional references in some of the group meetings to the possibility that the mill might be closed. The Trial Examiner reports an instance in which Taylor referred to the "New England" plant closing down because it could not compete, and Randy Thompson asked him point blank "if he was saying the Union caused them to close down," to which Taylor replied, "You said that, not us." In a similar incident employee Kintz testified that Elden replied, "I'm not allowed to say that." In another incident, employee Wilson testified that Rabenstein was worried be-

cause, if the Union got in, it could possibly mean his job and many others. We give these peripheral facts solely for the sake of completeness. The real thrust is in the speeches, the cartoon and the letter of March 9, 1967, supplemented by Schwarzenbach's letter of March 20, 1967, after the election, in which he stated, "what actually was at stake was the future of the mill and the long-term security of your job."

We thus approach the sensitive area of First Amendment rights of free speech where in a variety of contexts the Supreme Court has urged that these preferential rights be preserved. In particular we are to decide whether what was said and written on behalf of the Company exceeded the bounds of lawful expression within the meaning of Section 8(c)[9] of the Act, which was a new provision and became part of the Taft-Hartley Act in 1947. We follow and reaffirm the rationale of *N. L. R. B.* v. *Golub Corporation,* 388 F. 2d 921 (2d Cir. 1967), in which our Brother Friendly illuminated the text with a most helpful sketch of the historical background of Section 8(c).

Thus, the test is whether the fears expressed by Schwarzenbach were "shown to have so far transcended the bounds of reason as to justify the Board in finding them to be disguised threats of reprisal." 388 F. 2d at page 929. Doubtless a good faith doubt or prediction "could so far outrun any possible basis for it" as to justify the Board in concluding that a threat was intended. 388 F. 2d at page 928.

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9 Sec. 8(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

What was the crisis that impelled Schwarzenbach to write in his letter of March 9, 1967: "To say that I am concerned about the future of the mill is putting it mildly"? The answer is to be found in the letter, which according to the teaching of *Golub*, and of common sense as well, must be taken in its entirety. Thus viewed, and we have reproduced the letter in the margin,[10] the crisis was an economic

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10 (Letterhead of The Schwarzenbach Huber Co.,
470 Park Avenue South, New York, N. Y. 10016)

March 9, 1967

Dear Employee:

The Juniata mill has been through a number of crises in its 54-year history. None, however, do I consider as serious as the one it faces right now. To say that I am concerned about the future of the mill is putting it mildly.

About three years ago, after more than a decade of progress and steady employment, performance at Juniata began to slip. To make matters worse, at about the same time our main product, off-loom acetate fabrics, began losing favor with the consumer. Our largest customer, Stehli, under severe competitive pressure, began checking around for another source of these fabrics. A year ago they discovered that a better quality piece of goods could be purchased, at a lower price, from that southern giant, J. P. Stevens. Since that day Stehli orders have been few and far between.

Juniata, to survive, now required not only lower costs and fewer seconds, but a new product! Fortunately, our typewriter and computer ribbon sales had been growing slowly but steadily. Here possibly was the product! Last spring it was decided to strip Front Royal of these constructions and concentrate all nylon weaving at Juniata. We believed a solution had been found, but alas our troubles had only begun!

Most of you will remember last summer's chaos at Juniata. Low efficiency, terrible quality, poor earnings, all of which led to astronomical financial losses to the company. Worst of all, we were no longer delivering goods to our customers.

In desperation, our Industrial Fabrics Division repeatedly requested permission to have their goods woven on the outside. My answer this time was no for I knew that once these fabrics were handed over to a southern mill they would never again be woven at Juniata. *Without this work the mill was dead!*

Just when things look blackest, efficiency and quality started to pick up. By the end of the year the mill was back under reasonable control and all of us in New York heaved a sigh of relief. Though costs were still a long way from what they will have to be, and seconds still a burden, we were back in business and once again shipping goods to

one. The mill had been through a number of such crises in its 54-year history. The mill had been losing money, and Schwarzenbach gives chapter and verse, mentioning details that no man in his senses would have dared to state if they were fabrications, as the employees knew these facts as well as he did. Was it mere fiction that virtually all

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our customers. Many of us believed that enough time had been gained in which to buckle down and improve overall mill performance.

This was not to be. A group of hotheads among you has now decided to exploit a situation which for over a year has been highly explosive. This group tells you that by joining the TWUA you will be getting better earnings, better working conditions, better benefits and, of course, job security!

With 20 years of this business and numerous union elections (3 of them right in Juniata) under my belt, I know all this to be empty promises. *It has long been Company policy to pay at Juniata as well or better than our competitors.* If a raise, additional benefits, pensions, or whatever are truly in the cards, then you will get them! For this you need no TWUA, no $60.00 a year deducted from your pay-check. What you will not get and what the TWUA cannot get for you are benefits that lead to excessive costs. *No company can survive selling its product at a loss,* and this is exactly what we have been doing these last 8 months.

No matter what the TWUA may promise you, the Juniata record is a darn good one. Compare your wages, your holidays, your benefits, to industry figures, *to those in our own Front Royal mill for that matter!* Look at Juniata's 20-year record of around-the-clock employment. And the TWUA? *Why isn't there a single major textile operation left in the northeastern states?* Is that the kind of job security the union keeps talking about?

Why is it that today virtually all our competition is located in the South? Simple enough! The mills down there feel safe from the bickering, dissension and unreasonable demands that come with the TWUA. *Remember Altoona Rayon?*

Virtually all of Stehli's fabric requirements now are being woven down south. These are fabrics which for many a year were mounted on Juniata looms. Those same southern mills are just waiting to supply Mr. Hommel with every yard of computer fabric he requires. *For Juniata there is no alternative but to again become competitive.*

Not too long ago this very mill of ours was probably the finest filament mill in the country. Of late, it has been having more than its share of troubles. In the hope of finding solutions, many a change has been made. Occasionally this may have led to some dissension and misunderstanding between us. But let us not be discouraged! Like you, management seeks nothing other than a better, more competitive mill

the Company's competitors had moved South, and that the Altoona Rayon mill had followed their example? The employees knew better than that; and it is also a matter of general common knowledge. The employees knew, as does everybody else, that union demands often cause increased costs which render it difficult or impossible for management to continue operating an enterprise that is already losing money.

While Schwarzenbach's speeches were made extemporaneously and were not reported, they also must be taken as a whole, and there is no reason to doubt that the substance of the speeches is reflected in the contents of the letter of March 9, 1967.

The Company had taken care to avoid a single statement by anyone connected with management that the Altoona Rayon plant was forced by the Union to go South. That is the significance of Elden's response to a question at one of the group meetings: "I'm not allowed to say that." In fact, the stipulation shows that this very Union, The Textile Workers of America, had a contract with Altoona

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which can then again offer *true* job security to you all. This is the way to achieve better wages and benefits for all.

Many of you have known me for a long time. I have always been partial to this Juniata mill. I have never wilfully misled you. I am convinced that the Company record justifies your confidence. Now, as in the past, I firmly believe you have *absolutely nothing to gain* by voting in the union.

Be Sure To Vote, But Let It Be A
Resounding "No" On March 16th.

Sincerely,

THE SCHWARZENBACH HUBER COMPANY
/s/ ROBERT M. SCHWARZENBACH
Robert M. Schwarzenbach
President

RMS:MM

(Emphasis in original.)

Rayon for seven years before it moved in 1953. Certainly that plant could not have closed its doors as a reprisal against unionization.

We have studied this record, including all the exhibits, with the greatest care, and we find absolutely nothing to indicate antagonism or hostility toward this Union or any union. The most substantial of the findings of Unfair Labor Practices we have set aside. Of the two remaining findings of Unfair Labor Practices, that we will enforce, the first was the inconsequential Brown incident, to be described presently, and the other was the formation of the Committee, after the election and many months after the sending of the letter of March 9, 1967. And the Committee was voluntarily disbanded by the Company not long after it was established and commenced to function. Under all these circumstances, there is nothing to support an inference that the references to the possibility of moving South were intended to or in fact did constitute a threat to retaliate by closing the plant if the Union won the election. To paraphrase the statement in *Golub*, 388 F. 2d at page 928, "The only fair reading is that the employer would take these steps solely from economic necessity and with regret."

Nor do we find anything to the contrary in *N. L. R. B.* v. *Miller*, 341 F. 2d 870 (2d Cir. 1965). There this Court evidently thought the views expressed by the employer so far outran any possible basis for what was said as to justify the inference that a threat of reprisal was intended. This is not such a case. And we reaffirm the statement in *Golub*, 388 F. 2d at page 928, that the principle of *Miller* as above stated "is a principle that must be kept within narrow limits."

We conclude that the references to the possibility of moving South in the Schwarzenbach speech and in the letter

of March 9, 1967 and elsewhere did not constitute, within the meaning of Section 8(a)(1), and Section 8(c), a threat that the Company would retaliate by moving South if the Union won the election. We set aside the finding of the Board that these communications violated Section 8(a)(1) and we refuse to enforce it.

C

The Alleged Threat to Bargain From Scratch.

Employee Massini testified that Taylor told her that if the Union got in "The slate would be wiped clean. The Company would start bargaining from scratch with no paid holidays or vacations."

This is an isolated instance. It goes contrary to all the discussions that had been going on for weeks in the group meetings where the constant subject of the dialogue between Taylor and various employees related to the bargaining process whereby the Union if elected would or could meet the gripes of the employees.

The alleged interview was first with Grossman who at Massini's request asked Taylor to come down and they both talked to her. When her affidavit given to the Board was produced on cross-examination it appeared, so far as we can make out from the transcript, that Massini had attributed to Grossman what she testified was said by Taylor. When counsel for the Company offered the affidavit as impeachment, this was met by the objection, which is not intelligible to us, that such matters did not constitute "contradictions," and the affidavit was not admitted. Both Grossman and Taylor denied making any statement about "bargaining from scratch" but the Trial Examiner credited

Massini's version. Nevertheless, it seems highly improbable that Taylor would make such a statement.

We think, in the context of the entire testimony, that in this instance also the Trial Examiner reached an erroneous conclusion. We set aside and refuse to enforce this finding of Section 8(a)(1) violation as not supported by substantial evidence on the record as a whole.[11]

D

The Conversation Between Lewis and Bradley About Bumping.

Just about scraping the bottom of the barrel the Trial Examiner charges as a separate violation of Section 8(a)(1) a conversation between supervisor Lewis and employee Bradley. These two were old and constant, intimate friends. Each was the best man at the other's wedding. All this conversation amounts to is that Lewis, in the conversation with Bradley, referred to some of the group sessions in which some of the employees got the impression, or it was rumoured that "there was going to be bumping in every department on the floor and also, there was going to be several bosses replaced." As he knew Bradley was strong for the Union and he suspected Bradley would be President of the Union if the Union won the election, Lewis asked Bradley if there was any truth in these rumours. Bradley replied: "I attended all the union meetings and not once did I hear any mention of any bosses being replaced." Bradley also

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11 And see *Bauer Welding & Metal Fabricators, Inc.* v. *N. L. R. B.*, 358 F. 2d 766 (8th Cir. 1966); *Surprenant Mfg. Co.* v. *N. L. R. B.*, 341 F. 2d 756 (6th Cir. 1965); *Hendrix Mfg. Co.* v. *N. L. R. B.*, 321 F. 2d 100 (5th Cir. 1963). See also *Irving Air Chute Co.* v. *N. L. R. B.*, 350 F. 2d 176 (2d Cir. 1965).

told Lewis that he had no intention of being President of the Union.

How this disposition of an idle rumour running around the plant can be inflated into an Unfair Labor Practice is beyond our comprehension. We set aside this finding of violation of Section 8(a)(1) and refuse to enforce it. This is included in the general catch-all of Conclusion 7 of the Trial Examiner's decision, adopted by the Board. The various findings of Unfair Labor Practices in violation of Section 8(a)(1) are so scrambled and fragmented in the decision of the Trial Examiner that we may have missed one or two minor items, but we think not.

E

The Reprimand Administered to Clyde Brown.

While the incident is not one of great consequence, we think the Company did discipline Brown for soliciting for the Union in the plant during working hours, whereas it had previously followed a very liberal policy of permitting, at least on one occasion, solicitation for other than union purposes during working hours. We sustain this finding of violation of Section 8(a)(1) and will enforce it, as modified by the Board. This is the only one of the alleged violations of Section 8(a)(1) summarized in Conclusion 7 of the Trial Examiner and adopted and modified by the Board that we sustain and will enforce.

F

The Employee Committee.

After the election the Company thought it was a good idea to form an Employee Committee with rotating groups

of employees to bring complaints of the employees to the attention of management and assist in a proper, just and equitable processing of these complaints. The Company chose the employees who were to serve on the Committee, paid them for the time they spent on the business of the Committee and controlled the whole affair. This was a clear violation of Section 8(a)(2). There is no doubt that the Committee was a Labor Organization as defined in the Act. We sustain this finding of the Board and will enforce it, despite the fact that the Company voluntarily disbanded this Committee on July 27, 1967. This is Conclusion 6 of the Trial Examiner, adopted by the Board.

We permit the order setting aside the election to stand, not for the reasons given by the Board, but because we think it is better for all concerned to have a new election, if either the Union or the Company so desires.

APPENDIX

The "Representation" Cards

Reproduction of the Front and Back of Card No. 1

(Front)

428 LANGENBACKER

TEXTILE WORKERS UNION OF AMERICA FORM 42

Affiliate of the AFL-CIO and CLC

(DATE) 1 2 7 1967

I hereby accept membership in the Textile Workers Union of America of my own free will and do hereby designate said Textile Workers Union of America as my representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

MILL Schuyler

DEPARTMENT [illegible] SHIFT 3

NAME [illegible] (DO NOT PRINT)

ST. AND NO. [illegible]

CITY [illegible]

(RECEIVED BY)

HOME PHONE NO. [illegible]

(Back)

GC Ex# 20-1

RECEIVED JAN 23 1967

signed @ meeting

RECEIVED FEB 13 1967 NATIONAL LABOR RELATIONS BOARD

Summary of Data Contained on Front and Back of Cards Nos. 1-122 Inclusive

Card No. 1:

front

David Langenbacker 1-29 1967

received by CEP.

back

GCX # 20-1 received Jan 29 1967 signed @ meeting CEP

Board Stamp 10:15 Feb 13 1967

Card No. 2:

front

Anthony R. Salome 1/29/67

received by CEP.

back

GCX # 20-2 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 3:

front

Joyce Jewell 1/29 1967

received by CEP.

back

GCX # 20-3 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb. 13 1967

Card No. 4:

front

Melvin L. Wyland Jan 29 1967

received by ---

back

GCX # 20-4 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13, 1967

Card No. 5:

front

Richard Wiley Jan 29 1967

received by ---

back

GCX # 20-5 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 6:

front

Naomi Wasmeier 1/ 29 1967

received by CEP.

back

GCX # 20-6 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 7:

front

Robert D. Walters 1-29 1967

received by ---

back

GCX # 20-7 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 8:

front

William W Wilson 1/29 1967

received by ---

back

GCX # 20-8 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 9:

front

Jessie Walters 1-29 1967

received by CEP.

back

GCX # 20-9 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 10:

front

Randolph L. Thompson 1-29 1967

received by CEP.

back

GCX # 20-10 received Jan 29 1967 signed @ meeting ---

Board Stamp 10:15 Feb 13 1967

Card No. 11:

front

William Slone 1/28/ 1967

received by CEP.

back

GCX # 20-11 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 12:

front

Joseph R. Stacey 1/29/ 1967

received by CEP.

back

GCX # 20-12 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 13:

front

Pannie E. Ryan 1-29 1967

received by CEF,

back

GCX # 20-13 received Jan 29 1967 signed @ meeting CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 14:

front

Paul J Pruznak Jr. 1/28/67

received by CEF.

back

GCX # 20-14 received Jan 29 1967 signed @ meeting CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 15:

front

Melvin Mueller 1/29/66

received by CEF.

back

GCX # 20-15 received Jan 29 1967 signed @ meeting CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 16:

front

William Mayernick 1-29 1967

received by CEF.

back

GCX # 20-16 received Jan 29 1967 signed @ meeting CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 17:

front

Harry Frank McGraw Jan 29 1967

received by CEP.

back

GCX # 20-17 received Jan 29 1967 signed at meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 18:

front

John A. Diehl 1-29- 1967

received by CEP.

back

GCX # 20-18 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 19:

front

Walter J. Delozier Jr 1-29 1967

received by CEP.

back

GCX # 20-19 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 20:

front

James Edelblute Jan 29 1967

received by CEP.

back

GCX # 20-20 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 21:

front

Betty Elders 1/29/ 1967

received by CEP.

back

GCX # 20-21 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb. 13 1967

Card No. 22:

front

Paul J. Gardner 1-29 1967

received by CEP.

back

GCX # 20-22 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 23:

front

Raymond R. Guella 1-29 1967

received by ---

back

GCX # 20-23 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 24:

front

Edgar L Langenbacker Jr 1-29 1967

received by CEP.

back

GCX # 20-24 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 25:

front

Warren E Lantz 1-29- 1967

received by CEP,

back

GCX # 20-25 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 26:

front

Gerald D. Luther Jr Jan. 29 1967

received by CEP,

back

GCX # 20-26 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 27:

front

Darel E, Aller 1-29 1967

received by ---

back

GCX # 20-27 received Jan 29 1967 signed @ meeting CEP,

Board Stamp 10:15 Feb 13 1967

Card No. 28:

front

Edward A. Arthurs Jan 29 1967

received by CEP,

back

GCX # 20-28 received Jan 29 1967 signed @ meeting CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 29:

front

John C Bauer Jan 29 1967

received by CEF.

back

GCX # 20-29 received Jan 29 1967 signed @ meeting CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 30:

front

Ronald W. Bender Jan. 29 1967

received by CEF.

back

GCX # 20-30 received Jan 29 1967 signed @ meeting CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 31:

front

Lester Bennett 1-29 1967

received by ---

back

GCX # 20-31 received Jan 29 1967 signed @ meeting CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 32:

front

Jonas Corbin Jr. Jan 29 1966

received by CEF.

back

GCX # 20-32 received Jan 29 1967 signed @ meeting CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 33:

front

Clyde L. Brown 1-29 1967

received by ---

back

GCX # 20-33 received Jan 29 1967 signed @ meeting CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 34:

front

Donald P. Bradley 1-29 1967

received by CEF.

back

GCX # 20-34 received Jan 29 1967 signed @ meeting CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 35:

front

Ronald E Brackbill Jan 29 1967

received by CEF.

back

GCX # 20-35 received Jan 29 1967 signed @ meeting CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 36:

front

Francis Taddy January 30 1967

received by ---

back

GCX # 20-36 received Feb 1 1967 Left @ Hotel Desk CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 37:

front

Kenneth Delozier January 31 1967

received by Committee

back

GCX # 20-37 received Feb 1 1967 Left at Hotel desk CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 38:

front

Donald Dambeck 1-29 1967

received by Committee

back

GCX # 20-38 received Jan 30 1967. at Plant From R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 39:

front

Arthur Jock 31 Jan. 1967

received by Left @ Hotel Desk

back

GCX # 20-39 received Feb 1 1967 Left @ Hotel Desk CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 40:

front

Louis Delozier 1-29-67

received by Committee

back

GCX 20-40 received Jan 30 1967 At plant gate From R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 41:

front

John H. Hamel 1/30 1967

received by Committee

back

GCX 20-41 received Jan 30 1967 At Plant Gate From R. Thompson CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 42:

front

Melvin E. Kintz, Jr. January 30 1967

received by ---

back

GCX 20-42 received Jan 30 1967 From R. Thompson CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 43:

front

Richard Killinger Feb. 1 1967

received by R.T. CEF.

back

GCX 20-43 received Feb 1 1967 @ Plant Gate CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 44:

front

Clinton E. Lane 1-31 1967

received by Committee

back

GCX 20-44 received Jan 30 1967 At plant gate From R. Thompson CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 45:

front

Stephen J Lockard Jan 30 1967

received by Committee

back

GCX 20-45 received Jan 30 1967 At plant gate From R. Thompson CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 46:

front

Mary Ann DeBartolome 2-3 1967

received by ---

back

GCX 20-46 received Feb 3 1967 Randy Thompson CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 47:

front

Edna Cooper Jan 29 1967

received by Committee

back

GCX 20-47 received Jan 30 1967 At plant gate From R. Thompson CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 48:

front

Wilbur J Gensamer 2-1 1967

received by ---

back

GCX 20-48 received Feb 3 1967 Randy Thompson CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 49:

front

Jerry D. Gensamer 1/30 1967

received by ---

back

GCX 20-49 received Feb 3 1967 From Randy Thompson CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 50:

front

Mary J. Dickman Jan 30 1967

received by ---

back

GCX 20-50 received Feb 1 1967 Left @ Hotel Desk CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 51:

front

Richard E. Coley Jr January 30 1967

received by Committee

back

GCX 20-51 received Jan 30 1967 At plant gate from R. Thompson CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 52:

front

April Fahr January 29 1967

received by Committee

back

GCX 20-52 received Jan 30 1967 At plant gate From R. Thompson CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 53:

front

Miss Ruth Fisher 1 7-31 1967

received by ---

back

GCX 20-53 received Feb 1 1967 Left at Hotel Desk CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 54:

front

Ray. T. Ecker Ray T. Ecker 1-29- 1967

received by Committee

back

GCX 20-54 received Feb 2 1967 From A. Salome at Hotel CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 55:

front

Fred Fornwalt 2-2 1967

received by Committee

back

GCX 20-55 received Feb 2 1967 Rec'd from A. Salome at Hotel CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 56:

front

Mary C. McCartney 2/1/ 1967

received by Committee

back

GCX 20-56 received Feb 2 1967 Rec'd from A. Salome at Hotel CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 57:

front

Richard E. Brooks Feb 1, 196′ 1967

received by Committee

back

GCX 20-57 received Feb 2 1967 Rec′d from A. Salome at Hotel CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 58:

front

Janet R. Gibbons 1/30 1967

received by JJM

back

GCX 20-58 received Jan 31 1967 From Myers ~~R. Thompson~~ CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 59:

front

Walter Lindemer 2/3 1967

received by Edleblute

back

GCX 20-59 received Feb 5 1967 From J. Edleblute CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 60:

front

Mary Lou Davinsizer Jan. 6 Feb. 1967

received by C. Brown CEP.

back

GCX 20-60 ------ Rec′d from C. Brown at Plant gate Feb. 6, 1967 CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 61:

front

Jean M. Bittwy Jan 31 1967

received by mail CEF.

back

GCX 20-61 received Feb 1 1967 By mail CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 62:

front

Rody Ecker Feb. 1 1967

received by ---

back

GCX 20-62 received Feb 1 1967 @ Plant Gate CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 63:

front

Lilia Diehl Jan 30 1967

received by Diehl CEF.

back

GCX 20-63 received Feb 1 1967 @ Plant Gate CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 64:

front

William L Corl 30 Jan 1967

received by CEF. @ Plant Gate 2/1/67

back

GCX 20-64 received Feb 1 1967 @ Plant Gate CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 65:

front

James E. Lear 2/1 1967

received by ---

back

GCX 20-65 received Feb 1 1967 At Plant Gate CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 66:

front

George R Kauffman 1/30/ 1967
George R. Kauffman (typed)
received by ---

back

GCX 20-66 received Feb 1 1967 Plant Gate CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 67:

front

Wilbur K. Henry Jan 30 1967

received by ---

back

GCX 20-67 received Feb 1 1967 @ Plant Gate CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 68:

front

R. Gardner Jr. 1-30-67 1967

received by Wilson CEP.

back

GCX 20-68 received Feb 1 1967 @ Plant Gate CEP.

Board Stamp 10:15 Feb 13 1967

Opinion of the Second Circuit

Card No. 69:

front

Jerome Green 2-1 1967

received by Committee

back

GCX 20-69 received Feb 1 1967 @ Plant Gate CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 70:

front

Robert D Zeak 1/30 1967

received by Committee

back

GCX 20-70 received Jan 30 1967 At Plant Gate From R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 71:

front

Daniel H. Wilt January 30 1967

received by ---

back

GCX 20-71 received Jan 31 1967 Rec'd from R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 72:

front

Robert H. Weaver Jan 30 1967

received by Committee

back

GCX 20-72 received Jan 30 1967 At Plant Gate From R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 73:

front

Carl Wasmeier 1/29/67 1967

received by Committee

back

GCX 20-73 received Jan 30 1967 At plant gate From R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 74:

front

Mildred Smith Jan 29 1967

received by Committee

back

GCX 20-74 received Jan 30 1967 At plant gate From R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 75:

front

Gerald K. Settle Jan. 30, 1967

received by ---

back

GCX 20-75 received Jan 31 1967 Rec'd from R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 76:

front

James C. Russ Jan. 30 th 1967

received by Committee

back

GCX 20-76 received Jan 30 1967 At Plant gate From R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 77:

front

Archie Prosperi 1/30 1967

received by Committee

back

GCX 20-77 received Jan 31 1967 Rec'd from R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 78:

front

William Nolan Jan 29 1967

received by Committee

back

GCX 20-78 received Jan 30 1967 At Plant gate From R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 79:

front

Thelma Nolan Jan 29 1967

received by Committee

back

GCX 20-79 received Jan 30 1967 At plant gate from R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 80:

front

Joseph Mueller 1/29 1967

received by RT

back

GCX 20-80 received Feb 3 1967 From Randy Thompson CEP

Board Stamp 10:15 Feb 13 1967

Card No. 81:

front

Rudolph J. Mueller 1-31 1967

received by Committee

back

GCX 20-81 received Jan 31 1967 From R. Thompson CEP

Board Stamp 10:15 Feb 13 1967

Card No. 82:

front

Judy Massini 1/30 1967

received by ---

back

GCX 20-82 received Jan 31 1967 Rec'd from R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 83:

front

Joan McIntire 1/29 1967

received by Committee

back

GCX 20-83 received Jan 30 1967 At plant gate From R. Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 84:

front

Raynor G. McGinnis 1/30 1967

received by RT D

back

GCX 20-84 received Feb 3 1967 From Randy Thompson CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 85:

front

Nancy L Wise 2/6 1967

received by James Edleblute

back

GCX 20-85 received Feb 6 1967 11:05 p From James Edleblute @ Plant Gate CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 86:

front

Robert W. Singer 2-6 1967

received by J. Edleblute CEF.

back

GCX 20-86 received Feb 6 1967 11o5 pm From James Edleblute at Plant Gate CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 87:

front

Ted Mastos 2-6 1967

received by James Edleblute CEF.

back

GCX 20-87 received Feb 6 1967 11o5 P. From James Edleblute @ Plant Gate CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 88:

front

Howard C. Shawley Sr. Feb, 1 1967

received by Committee

back

GCX 20-88 received Feb 2 1967 From A. Salome at Hotel CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 89:

front

Clair W. Marshman 1-30- 1967

received by A. Salome CF

back

GCX 20-89 received Feb 2 1967 From A. Salome at Hotel CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 90:

front

Melvin McIntire 1-31- ∅ 1967

received by ---

back

GCX 20-90 received Feb 1 1967 Left @ Hotel Desk CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 91:

front

R.L. Wakefield 2/2∕ 1967

rece[redacted]d by CB

back

GCX 20-91 received Feb 3 1967 Clarence Brown CEF.

Board Stamp 10:15 Feb 13 1967

Card No. 92

front

Ronald Taddy 1-31 1967

received by JJM

back

GCX 20-92 received Jan 31 1967 From Myers CEF.

Board Stamp 10:15 Feb 13 1967

Union Stamp: Textile Workers Union of America, A.F.OF L.-C.I.O. 1304 High Street Pottstown, Pennsylvania

Card No. 93:

front

Donna Markel January 30 1967

received by JJM

back

GCX 20-93 received Jan 31 1967 Myers CEP.

Board Stamp 10:15 Feb 13 1967

Union Stamp: Textile Workers Union of America, A.F.OF L.- C.I.O. 1304 High Street Pottstown, Pennsylvania

Card No. 94:

front

Margaret Smouse Jan 30 1967

received by mail CEP.

back

GCX 20-94 received Feb 1 1967 By mail CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 95:

front

John Mittermeier 2/1/67

received by ---

back

GCX 20-95 received Feb 1 1967 @ Plant Gate CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 96:

front

Helen McKendree 2 ------ 1967

received by at Plant Gate CEP 2/10/67

back

GCX 20-96 ------ --------

Board Stamp 10:15 Feb 13 1967

Card No. 97:

front

Patrick G. O'Hara Jan 31 1967

received by ~~R. Guella~~ J.E.

back

GCX 20-97 ------ ------- --------

Board Stamp 10:15 Feb 13 1967

Card No. 98:

front

Margaret A. Van Tries 2/1 1967

received by CEP. at Plant Gate 2/2/67

back

GCX 20-98 received Feb 2 1967 at Plant Gate CEP.

Board Stamp 10:15 Feb 13 1967

Card No. 99:

front

William F Yingling Jr 2-9 1967

received by C Brown J.E. 2-9-67

back

GCX 20-99 ----- -------

Board Stamp 10:15 Feb 13 1967

Card No. 100:

front

Maury L. Delozier Feb. 13 1967

received by J.E.

back

GCX 20-100 received Feb 21 1967 From J. Meyers CE

Board Stamp 1967 Mar 2 am 9:40

Opinion of the Second Circuit

Card No. 101:

front

John Bianconi 2/14/67

received by JJM

back

GCX 20-101 ------ Rec'd from J. Meyers 2/14/67 CEF.

Board Stamp 1967 Mar 2 am 9:40

Card No. 102:

front

Calsie D. Gearhart 2-11 1967

received by JJM

back

GCX 20-102 ------ Rec'd 2-13-67 From JJM CEF.

Board Stamp 1967 Mar 2 am 9:40

Card No. 103:

front

Gordon Runk Feb 17, 1967

received by J.M CEF.

back

GCX 20-103 ------ Rec'd from J. Meyers 2/19/67 CEF.

Board Stamp 1967 Mar 2 am 9:40

Card No. 104:

front

Jay Nedimyer 2/21/ 1967

received by JE

back

GCX 20-104 received Feb 21 1967 From J. Meyers CEF.

Board Stamp 1967 Mar 2 am 9:40

Card No. 105:

front

William R. Potter Febr. 21 1967

received by J.E.

back

GCX 20-105 received Feb 21 1967 From J. Meyers CEF.

Board Stamp 1967 Mar 2 am 9:40

Card No. 106:

front

Harry Lynn Walters 2/21 1967

received by JE

back

GCX 20-106 received Feb 21 1967 From J. Meyers CEF.

Board Stamp 1967 Mar 2 am 9:40

Card No. 107:

front

Judy Walters 2/21 1967

received by JE

back

GCX 20-107 received Feb 21 1967 From J. Meyers CEF.

Board Stamp 1967 Mar 2 am 9:40

Card No. 108:

front

Mary Workinger February 21 1967

received by JE

back

GCX 20-108 received Feb 21 1967 From J. Meyers CEF.

Board Stamp 1967 Mar 2 am 9:40

Card No. 109:

front

Harold Taddy 2-20 1967

received by CB.

back

GCX 20-109 ------

Board Stamp 1967 Mar 2 am 9:40

Rec'd of James Myers 2/23/67 CEP.

Card No. 110:

front

Francis Long 2-20 1967

received by C.B.

back

GCX 20-110 ------

Board Stamp 1967 Mar 2 am 9:40

Rec'd of James Myers 2/23/67 CEP.

Card No. 111:

front

John Hillard 2/16/ 1967

received by @ Plant Gate From CB

back

GCX 20-111 ------

Board Stamp 1967 Mar 2 am 9:40

Rec'd 2/16/67 From Clyde Brown @ Plant Gate CEP.

Card No. 112:

front

Richard O. Hamp Feb. 20 1967

received by P.P. JJM

back

GCX 20-112 ------

Board Stamp 1967 Mar 2 am 9:40

Rec'd from J. Meyers 2/22/67 CEP.

Card No. 113:

front

Robert J. Hamp Feb. 20, 1967

received by Wilson WW CEP.

back

GCX 20-113 ------ Rec'd from W. Wilson 2/24/67 CEP.

Board Stamp 1967 Mar 2 am 9:40

Card No. 114:

front

Benedict Hebler 2/19 1967

received by P.P. JJM

back

GCX 20-114 ------ Rec'd from J. Meyers 2/22/67 CEP.

Board Stamp 1967 Mar 2 am 9:40

Card No. 115:

front

Nick Colella 2/6 1967

received by J. Corbin Jr. CEP.

back

GCX 20-115 ------ Rec'd at meeting 2/26/67 CEP.

Board Stamp 1967 Mar 2 am 9:40

Card No. 116:

front

Annette Steinbugl February 20 1967

received by Paul Gardner CEP.

back

GCX 20-116 ------ Rec'd @ meeting 2/26/67 CEP.

Board Stamp 1967 Mar 2 am 9:40

Card No. 117:

front

Clarence M. Aikens Mar. 6 1967

received by mail CEP.

back

GCX 20-117 received Mar 6 1967 By mail CEP.

Board Stamp 1967 Mar 13 am 9:07

Card No. 118:

front

Charles L. Brown 3/6 1967

received by mail CEP.

back

GCX 20-118 received Mar 6 1967 By mail CEP.

Board Stamp 1967 Mar 13 am 9:07

Card No. 119:

front

Howard D. Mentzer Feb. 25 1967

received by C.B. CEP.

back

GCX 20-119 ------

Board Stamp 1967 Mar 13 am 9:06 Rec'd from Clyde Brown at meeting 3/8/67 CEP.

Card No. 120:

front

Leonard Wilson Feb 24 1967

received by R.t.

back

GCX 20-120 ------

Board Stamp 1967 Mar 13 am 9:06 Rec'd from Randy Thompson 3/1/67 CEP.

Opinion of the Second Circuit

Card No. 121:

front

Gerald S. Boonie 3-2 1967

received by JJ Sanello

back

GCX 20-121 ------ Rec d 3/2/67 J Cline myer CEP.

Board Stamp 1967 Mar 13 am 9:07

Card No. 122:

front

Donalrd R. Figliola Feb. 27 1967

received by JE. JJM.

back

GCX 20-122 ------ Rec'd from James Meyers 2/28/67 CEP.

Board Stamp 1967 Mar 13 am 9:06

National Labor Relations Board Decision and Order

On December 29, 1967, Trial Examiner Phil Saunders issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and the Respondent filed exceptions to the Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts[1] the findings,[2] conclusions, and recommendations[3] of the Trial Examiner, as modified herein.

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[1] Respondent asserts in its brief that the Trial Examiner relied on the fact that the Respondent consulted its attorney before replying to the Union's request for bargaining in finding that Respondent had no good-faith doubt of the Union's majority status. We do not believe that the Trial Examiner relied on the fact that Respondent consulted its attorney, nor do we.

[2] Although the Trial Examiner found that the Respondent engaged in violations of Section 8(a)(1) during the predection period and recommended dismissing the petition in Case No. 6-RC-4363, he did not specifically find on the basis of the objections filed that the Respondent had engaged in activity warranting setting the election aside; we do so find and hereby set the election aside.

[3] We note that the Trial Examiner found that the warning addressed to employee Clyde Brown for engaging in union-organizing activities violated Section 8(a)(1), but did not require the Respondent to remove any reference to such warning from Brown's

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, the Schwarzenbach-Huber Company, Altoona, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Insert the following as paragraph 2(c) and reletter the present paragraph 2(c) and subsequent paragraphs accordingly:

"(c) Remove from the personnel records of Clyde Brown any and all reference to the warning given him for engaging in union-organizing activities."

2. Insert the following as the tenth indented paragraph in the Notice attached to the Trial Examiner's Decision:

> WE WILL remove from the personnel records of Clyde Brown any and all reference to the warning given him for engaging in union-organizing activities.

Dated, Washington, D. C. APR 17 1968

.....

John H. Fanning, Member

.....

Howard Jenkins, Jr., Member

.....

Sam Zagoria, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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personnel records. We shall amend the Trial Examiner's Recommended Order accordingly.

Trial Examiner's Decision

Statement of the Case

PHIL SAUNDERS, Trial Examiner: Upon a charge and four amended charges filed by Textile Workers Union of America, AFL-CIO, herein called the Union, a Complaint issued on July 10, 1967, and an Amended Complaint issued on July 26, 1967, against The Schwarzenbach-Huber Company, herein called the Company or the Respondent. The Amended Complaint, as further amended at the hearing, alleges that the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1), (2) and (5) of the National Labor Relations Act. A trial was held before me in Altoona, Pennsylvania, and all parties were represented by counsel and participated fully at the hearing. Oral arguments were waived, but briefs were filed and the same have been given due considerations.[1]

Upon the entire record in this case and my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Respondent

The Respondent is a New Jersey corporation with its principal office in New York, New York, and is engaged in the manufacture of textile fabrics. During the 12 months preceding July 1, 1967, Respondent received directly from outside Pennsylvania for use at its Altoona, Pennsylvania, plant goods and materials valued in excess of $50,000 and,

[1] To correct a few inadvertent errors appearing in this transcript, I have made corrections in accordance with the General Counsel's motion on same.

during the same period of time, Respondent shipped directly to points outside Pennsylvania from its Altoona, Pennsylvania, plant goods valued in excess of $50,000. The complaint alleges, the answer admits, and I find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Textile Workers Union of America, AFL-CIO, is, and at all times material herein, has been a labor organization within the meaning of Section 2(5) of the Act. The Company denies that the Employee Committee, herein called the Committee, is a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

The complaint, as amended, alleges that the Company disciplined, threatened, and interrogated employees because of their union activities; that the Company sponsored, promoted, assisted, dominated, administered, and contributed support to the Committee; that since on or about February 9, 1967, a majority of Respondent's employees in a production and maintenance unit designated and selected the Union as their bargaining agent, and that since on or about February 14, 1967, the Company has refused to recognize and bargain with the Union. The main and overriding issue in this case is whether or not the Union, since on or about February 9, 1967, has been the representative of a majority of the production and maintenance employees at the Company for the purpose of

collective bargaining. The General Counsel and the Union maintain that under the *Bernel Foam* decision, 146 NLRB 1277, the Company was obligated to recognize and bargain with the Union notwithstanding the fact that the Union lost the election. Other issues concern the 8(a)(1) allegations and the Committee and the impact of these factors, if any, on the main and central 8(a)(5) allegation.

In late January, 1967,[2] the Union began an organizing campaign among the Respondent's production and maintenance employees. On January 29, these employees began signing authorization cards. On February 9, the Union sent a letter to Respondent requesting recognition. On February 14, the Respondent, by letter, refused to extend recognition to the Union. On February 13, the Union filed a petition for an election among the Respondent's production and maintenance employees and on February 21, filed an amended petition embracing the same unit. Pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on March 16, in which 82 votes were cast for the Union, 106 against the Union, and 13 ballots were challenged.

On March 23, the Union filed timely objections to conduct affecting the results of the election.[3] Following an investigation by the Board's Regional Director on the objections, a number were withdrawn and the remaining were consolidated in this proceeding with the unfair labor practice complaint. The appropriate unit consists of the following:

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[2] All dates are 1967 unless specifically stated otherwise.

All production and maintenance employees at the Respondent's Altoona, Pennsylvania, plant, excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

The Respondent's answer admits the supervisory and agent status of Robert M. Schwarzenbach, Brooks Taylor, Gerald Elden and Merle Grossman, but denies such status as to William Lewis and Glen Rabenstein.

Plant Manager, Brooks Taylor, testified that William Lewis is the training manager at the plant and as a result was foreman on the third shift, that Lewis is responsible for the development and administration of the Company's training and retraining program, that he directly supervises the work of Joan Iaia and Ruby Evans when they act as weaving instructors, that Lewis has authority to recommend the transfer of an employee to another type of work and that his voice in such transfers would be an "important recommendation." This record also shows that prior to the March 16 election, Taylor directed Lewis to talk to the employees regarding the Union and to learn what their grievances were, in order to ascertain what led to their interest in the Union.

Taylor testified that Rabenstein's title is standards engineer, and in this capacity he is responsible for the direction of the "method time measurement" system. The standards clerk (Terry Wray) and the frequency checker (Charles Blair) work directly under Rabenstein's supervision, and he is also responsible for the work of Wray and Blair. At certain times, the weaving instructors (Joan Iaia and Ruby Evans) are also subject to his supervision. Several days

before the March 16 election, Taylor directed Rabenstein to talk to the employees about the Union and the election, and to ascertain their grievances.

The above admissions and testimony by Taylor reflects that the work of Lewis and Rabenstein was considerably more than routine. Lewis is responsible for training in certain operations of the plant, he specifically directs the work of two weaving instructors, and he can effectively recommend the transfer of employees who do not measure up as potential weavers. Lewis, therefore, exercises considerable discretion in making job assignments. Rabenstein directs the "M.T.M." system, and at various times has under his authority and control five or six employees, and, thereby, directs the work of these people. In view of the fact that the authority exercised by Lewis and Rabenstein is not of mere clerical nature, but requires the use of independent judgment coupled with the right to direct employees in their work assignments—all of which was amply demonstrated by the testimony of the plant manager—I find that Lewis and Rabenstein are supervisors within the meaning of the Act, and the Company is responsible for their conduct and statements. Further indicative of the above, is the admission by Taylor that prior to the election he directed or asked both of them to talk to employees about the Union and their grievances. In their respective capacities the Company obviously felt that these two men were in strategic positions to do so, and the Company would not have bestowed such delicate missions without the knowledge or understanding that they were a part of the management family.

Employee Donald Bradley testified that on or about March 14, he was called into the office occupied by Super-

visor Lewis. On this occasion Lewis—admittedly an old friend of many years—told Bradley that he and Rabenstein had "volunteered" to talk to employees and then stated, "He [Lewis] was concerned about his own job—as to the future of it—if Mr. Schwarzenbach should move from town or close the plant." Supervisors Lewis and Bradley then talked about some of the discussions that had taken place in the numerous small group meetings conducted by the Company with its employees. Lewis also informed Bradley that he had heard that if the Union got in, Bradley would be the union president, and that Bradley would leave his job in order to operate his insurance agency on a full-time basis. Bradley replied that his work schedule is such that he could not assume the union presidency, and his insurance agency was not large enough to justify his full time. Lewis went on to say that he did not know what the Union was telling the employees, but was under the impression that there would be "bumping" in every department, and that several bosses would be replaced. Bradley replied that he had attended union meetings and never heard any mention of bumping or the replacement of any bosses. Lewis also asked Bradley as to what he thought the Union was getting for him.

This record shows that several weeks prior to the March 16 election the Company held small group meetings—from approximately 8 to 10 employees. Such meetings were held in the Respondent's general office, at or near the conference table located therein. Gerald Elden, Respondent's vice president, and Plant Manager Taylor conducted these meetings which were attended by virtually all the unit employees during worktime. Supervisors Lewis and Raben-

stein also attended and took part in at least some of these small group meetings. Employee Gerald Luther testified that Elden and Taylor did most of the talking and that there were discussions as to why employees wanted the Union and inquiries as to what the employees thought the Union could get for them. Employee Randolph Thompson stated that he attended two of these small group meetings and on one occasion Taylor referred to the "New England plant closing down, because they couldn't compete." Thompson then asked if Taylor was saying the Union caused them to close down, and Respondent's vice president Elden replied, "You said that, not us."[3] Judith Massini testified that at the small group meeting she attended Taylor asked the employees why they wanted the Union and what the Union could do for them. Taylor then pointed out the benefits which the employees currently enjoyed, expressed the opinion that a union was not needed, and said that he hoped they would vote "no." At a small group meeting attended by employee Melvin Kintz, Taylor and Elden asked the employees for their complaints, and in response to such complaints, Taylor or Elden would say, "How do you think the Union can help you here?" Elden then also brought up the New England plant and told the employees that after the Union got in there, "it quit and went south." When Kintz asked if Elden was attributing to move south to the Union, Elden replied, "I'm not allowed to say that." Elden then informed Kintz that he spoke well enough for

[3] The parties stipulated that Altoona Rayon—referred to in General Counsel's Exhibit No. 5—closed its plant permanently in or about the year 1953, and at the time it was under contract with the Charging Party or the Union herein.

himself, and asked him why he wanted the Union to speak for him. Richard Wiley also attended one of these group meetings and Elden inquired as to why the employees thought the Union could give them any assistance. Clyde Brown stated that in the small meeting he attended Taylor made the statement that he did not think the Union could get the employees any more than they already had.

On or about February 21, Taylor received complaints that an employee, Clyde Brown, had been campaigning for the Union during working time. Taylor then called Brown to his office and told him that solicitation for the Union was allowed on the employee's own time, and only in nonwork areas. At the conclusion of this reprimand, Taylor gave Brown a written confirmation of the warning and had Brown sign it.[4] Taylor testified that while the Company does not have a written no-solicitation rule, they, nevertheless, "maintained" such a rule and that he had never informed anyone to the contrary. In his affidavit—General Counsel's Exhibit No. 23, pages 8 and 9—Taylor claimed that the plant did not maintain a specific no-solicitation or distribution rule, and went on to state that it has been the Respondent's general policy to permit all kinds of solicitation, but only in nonworking areas. Taylor then testified that he permitted employees to solicit in working areas except when he received a specific complaint about it. Credited testimony by Donald Bradley shows that in late August, a solicitation of funds for a sick employee was conducted in the plant, and this solicitation was participated

[4] General Counsel's Exhibit No. 7.

in by a supervisor, Leroy McMullen, in work areas, during working time. It is further significant that during the preelection campaign other employees asked Taylor if they could buy buttons and decorate them with the slogan, "Vote No," and wear the buttons in the plant. Taylor's answer to this was that he "did not wish to get involved." I agree that these incidents portray the Respondent's disparate approach to union and nonunion activities in its plant. As pointed out, it is clear that Clyde Brown was disciplined for engaging in union organizing activities in the plant, despite the fact that there was no rule against such activities, and the making of such an "on the spot" rule by Taylor, when he learned of Brown's activities, was not in furtherance of Respondent's legitimate interest of serving production, order, or discipline, but was specifically for the purpose of hindering union organization.

This record also reveals that several days prior to the March 16 election, President Schwarzenbach came to the plant and addressed the employees with each shift being assembled in the plant warehouse. James Edelblute, a 12-year employee, testified that this was the first speech Schwarzenbach had made to the employees as long as he had been at the plant. Judith Massini testified that Schwarzenbach stated in his speech to her shift that he had invested a lot of money in the plant, that it was well equipped, and he could easily sell it or lease it to a company like Sylvania. Massini testified he also said that he was relying on the employees who knew him best to support him in the election, and urged the employees to vote "no." Randolph Thompson testified that Schwarzenbach remarked to his shift that the Respondent was an old company which

had been in the area for a long time, that the plant had gotten along without a union, and that if the Union got in or failed to get in, "they were going to try to make a go of it either way," but then referred to "the New England plant closing down" because it could not compete.

Employee William Wilson testified that the day before the election, Supervisor Rabenstein informed him that he —Rabenstein—was there to protect his own job, and then went on to say that if the Union was to win the election, it could possibly mean his own job as well as "many others."

Judith Massini testified that in early March, prior to the election, Supervisor Merle Grossman told her to vote "no," inquired why she wanted a union, informed her that if the Union was successful the first request would be to ask the Company to deduct union dues from paychecks, and the Company would ask the Union "to give up something like a paid holiday or eliminate a job or employee or something like that." Grossman then called Taylor to also talk to Massini and Taylor informed her that if the Union won the Company would start negotiations "from scratch" with no paid holidays or vacations, and "the slate would be wiped clean." Grossman admitted a union conversation with Massini, but denied saying anything other than to vote no. Taylor testified that he told Massini that in bargaining with a union, it was his understanding that all benefits remained the same, but if the parties reach a contract, the contract would be controlling as to wages and conditions.

The complaint alleges that in a leaflet to the employees on March 2, and in letters to employees on March 9 and 20, the Company threatened employees with the closing and/or moving of the plant, and resultant loss of employment, if the employees chose the Union as their collective-bargain-

ing representative. The leaflet of March 1 shows a sketch of the Respondent's plant with the following heading in large printing:

> We have, here in Altoona, one of the most finest textile mills in the world . . . South Carolina not excluded. (Don't let's wreck it now!)

Below this heading is a sketch of a plant in ruins, with the subhead, "Remember Altoona Rayon?" As pointed out earlier herein Altoona Rayon closed its Altoona plant permanently in or about the year 1953, and at that time it had been under contract with the Textile Workers Union of America, AFL-CIO, the Charging Party in this case. The March 9 letter sent to employees was signed by Respondent's president Robert Schwarzenbach. The first paragraph states in part as follows: "To say that I am concerned about the future of the mill is putting it mildly." The next several paragraphs of the letter outlines recent economic and operational difficulties and concluding paragraphs contain these excerpts:

> No company can survive selling its products at a loss, and this is exactly what we have been doing these last 8 months * * * Look at Juniata's 20-year record of around-the-clock employment. And the TWUA? Why isn't there a single major textile operation left in the northeastern states? Is that the kind of job security the union keeps talking about?
>
> Why is it that today virtually all our competition is located in the South? Simple enough! The mills down there feel safe from the bickering, dissension and unreasonable demands that come with the TWUA. Re-

> member Altoona Rayon? * * * I firmly believe you have absolutely nothing to gain by voting in the union.

Under date of March 20—after the election—President Schwarzenbach sent another letter to the employees congratulating them on the outcome of the election and in the second paragraph stated:

> As a group you voted wisely since what actually was at stake was the future of the mill and the long-term security of your job.[5]

Insofar as the 8(a)(1) allegations are concerned—the Company points and argues that in the speech by Schwarzenbach, he merely stressed a concern for the needs of the Company to remain competitive in the face of union demands, and that there were no implications in the speech or leaflet that the Company would follow in the footsteps of Altoona Rayon because of the Union. The Company also maintains that the letters of March 9 and March 20 contain no more than an explanation of the Respondent's concern with their competitive position in event of union organization. The Respondent argues that the remarks by Lewis to Bradley were his own opinions, and that the purposes of the small group meetings were simply to ascertain whether the employees had any complaints about their working conditions. The Respondent would also discredit any inferences in the fact that such meetings were held in the Company's general office.[6]

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[5] See General Counsel's Exhibit Nos. 5, 6 and 10.

[6] Schwarzenbach, Elden, Lewis, and Rabenstein did not testify in this proceeding, and, therefore, conduct and statements attributed to them stand undenied.

By systematically assembling small groups of employees shortly before the election and interrogating them regarding their grievances which led them to seek union representation, and under these circumstances further asking employees why they wanted the Union and what they thought the Union could get for them was unlawful interferences with the organizational activities of its employees and violative of the Act. *American Furniture Company, Inc.*, 118 NLRB 1139, 1147. President Schwarzenbach's speeches to employees, as aforestated, went beyond the Respondent's concern to remain competitive and definitely conveyed a threat—directly or indirectly—that the plant would close or move if the employees voted favorably for the Union in the upcoming election. By making the specific remark to the New England plant closing, as aforestated, is ample evidence that Schwarzenbach sufficiently planted his threat in the minds of the employees and this is especially so when his speeches to the three shifts are viewed in the context of Respondent's other unfair labor practices.

The leaflet and letters, as set forth earlier herein, also go beyond the protection afforded under Section 8(c) of the Act. The threat contained in these documents had a constant and ringing message—if the Union wins, we move or close. By the continual implementation of this resounding theme and with the repeated reminder that Altoona Rayon or the New England plant had closed, the desired communication to the employees had been achieved. This also becomes abundantly pronounced when consideration is given to the same theme contained in the speeches by President Schwarzenbach, and the same subject matter was also brought up and intermingled in the various conversations

and interrogations with employees at the numerous small group meetings. By March 16 the Company had most certainly implanted and cultivated this rapidly growing embryo, and the election harvested the crop as duly planned and calculated. It appears to me that this matter is finally put to rest with the Respondent's own letter to its employees on March 20—4 days after the election. In this document the Company admits that the future of the mill was at stake and also the security and jobs of the employees. As pointed out, the Respondent had achieved its goal and the employees were now again reminded that they had been saved from economic devastation, if not outright extinction. The oral and written word had been used in quantities to achieve the desired end—defeat of the Union in the election. The letter of March 20 recapitulates what the Respondent had been telling the employees all along —the plant would be closed if the Union won the election. The supposedly hidden message so skillfully defised, now emerges with open and complete clarity.

Supervisor Lewis' statement to Bradley that he was concerned about the future of his own job if Schwarzenbach should move or close the plant was at least an implied threat that the plant would be closed or moved if the employees choose the Union in the election, and which was only 2 days away at the time this statement was made. Furthermore, Lewis' questioning of Bradley as to whether he would become the union president and what the Union told employees with respect to bumping was unlawful interrogation and violative of Section 8(a)(1). It is well established that the illegality of the remarks is not cured by the casual nature of the conversation or the personal relation-

ship of the parties thereto, nor by the rejection of Lewis' remarks or statements. The remark, prior to the election, by Supervisor Rabenstein to employee Wilson that he was concerned with his own job as well as "many others," must also be deemed a threat in loss of jobs if the Union won the election. Also the credited testimony by Judith Massini to the effect that the Company would only bargain with the Union on the basis that existing employee benefits would first be eliminated, has been deemed violative as unlawful threats and interference,[7] and I so find here. As previously set forth herein, I have also found that the Company disciplined Clyde Brown for engaging in union organizational activities despite the fact that there was no nonsolicitation rule or known plant policy against such activity, and the Respondent's conduct in this respect is violative of Section 8(a)(1) of the Act.

On April 18, the Respondent mailed a notice to employees and such notice was signed by Taylor. Its purpose was to announce the establishment of the Committee. The notice, in part, reads as follows:

> Just prior to the recent union election, I spent about two weeks in meetings with virtually every employee. During those meetings, I heard complaints that I thought were legitimate and justified. Also, I heard complaints that probably could have been avoided or eliminated if you had been fully informed with respect to the reasoning behind the actions which caused the hard feelings.

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[7] *Bauer Welding and Metal Fabricators, Inc.*, 154 NLRB 954, 962.

During that period, the decision was made that if the Union was rejected, we would try to organize and (sic) Employee Committee. The purpose of the committee would be to act as a grievance committee for you and to act as a vehicle for improving communications between you and the Company. Of course, you do not have to take your complaints or questions to a committee member if you would rather not—you still have the right of going to your supervisor or to me, or to Mr. Elden or Mrs. Schwarzenbach. But some of you don't like to do this, so the committee should be helpful in this respect.

The following employees have been interviewed and *they also feel* that such a committee might be beneficial and *have agreed* to serve on the first committee. They are * * * *

This group will serve for about three (3) or four (4) months and then another group *will be asked* to serve. As soon as we get organized, a tentative schedule of meetings will be posted on the bulletin board.[*]

In his own testimony Plant Manager Taylor admits the following: The Committee met in his office, the Company chose the membership of the Committee, employee members were paid for time spent in attending meetings of the Committee, Taylor attended each meeting, no election was held to ascertain if the employees wanted the Committee, the Committee submitted grievances with respect to condolence or bereavement pay and the same was adjusted, the Com-

[*] General Counsel's Exhibit No. 11.

mittee also submitted grievances on vacation schedules, the Committee brought up the subjects of an employee bulletin board—new wages scales—and additional restrooms, the Company initially determined the length of time an employee member would serve on the Committee and also determined the basis for membership (two employees from each shift), the Committee has no bylaws—constitution or dues, the Committee has no officers of its own, and as a whole the Committee has conducted or held no meetings other than those called by the Company. Employees Richard Wiley and Gerald Luther also gave some testimony as to the Committee, and they are in general agreement with Taylor's versions and admissions.

The Respondent mainly argues that the Committee was organized after the election at the suggestion of several employees, and was subsequently disbanded and is no longer recognized so that the issues with respect to it are moot. The Company also suggest in their argument that whatever the finding in respect to the Committee—the issues are totally unrelated to any other aspect of this proceeding. I am not in accord with the Respondent's positions. In the overriding considerations of this case and in its totality, the formation and workings of the Committee has a significant impact. The Act defines a labor organization as:

> . . . any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Trial Examiner's Decision

The Committee presented numerous and various grievances to the Company, as admitted by Taylor—pay, vacations, bulletin boards, restrooms. It is obvious that the Committee has dealt with matters which appropriately come within the scope of collective bargaining, i.e., wages, hours and other terms or conditions of employment, and therefore, the Respondent's denial that the Committee is a labor organization is without merit. In fact, Taylor agreed that a function of the Committee is to present employee grievances to the Company.

Taylor testified that two unnamed employees had suggested the idea for the Committee. However, the April 18 notice to employees by Taylor, as aforementioned, states that during the small group meetings with employees the Company heard complaints that probably could have been avoided, and that during this period the decision was made to organize the Committee in event the Union lost the election. There is no mention in the April 18 notice of any idea for the Committee coming from employees, and all reasonable interpretations of the wording in the written notice point to the conclusion that management actually initiated and promoted the Committee. The notice provided that "we" would try to organize the Committee. In view of the above, and the fact that the two employees who supposedly suggested the Committee remain anonymous—I must conclude that the Committee was formed exclusively by the Company. Since the Respondent selected all employee members of the Committee, determined their initial selection, set the meeting dates, paid all financial support including time spent at the meetings, and the fact that Taylor attended all the Committee meetings—duly established be-

yond all doubt that by these acts the Respondent unlawfully dominated, assisted and interfered with the administration of the Employee Committee and thereby violated Section 8(a)(2) and (1) of the Act, and I so find.

On July 27 the Company sent a notice to employees telling them that the Committee was disbanded and will no longer exist or function.[9] However, even if the Committee is now in an inactive status, this does not necessarily mean or assure that such a status is on a permanent basis. I further agree with the General Counsel that the danger of continued assistance to and domination of the Committee is most obvious unless the Respondent is restrained by an appropriate remedial order, and it is well established that findings of violations and remedies therefore serve a preventive as well as remedial purpose. The July 27 notice is insufficient to adequately remedy the effects of the Respondent's unlawful assistance and domination.

Following the demand for recognition by the Union on February 9, the Company notified the Union on February 14 that it was refusing recognition on the grounds that it doubted the Union's majority. In the hearing before me the parties stipulated to the inclusion of 195 employees in the production and maintenance unit. At the outset of the hearing, a list of 191 names of unit employees was agreed upon, but later, the following four individuals whose names do not appear on the list marked General Counsel Exhibit No. 2, were agreed to be excluded: Wilhelmina Hoelzel, Terry Wray, Pearl Tremmel, and Charles Blair; the following four employees were agreed to be included: Paul

[9] Respondent's Exhibit No. 2.

Ricard, Jr., Walter Krise, John Golding, and David Finochio. This accounts for the total of 195 unit employees agreed upon at the trial. However, the Respondent offered testimony as to four additional employees and in this respect argues as follows: "It is the Respondent's contention that employees Iaia and Evans (hourly rated weavers who from time to time instruct employees), Becker (who at the time of the demand for recognition had been granted a temporary leave of absence because of a babysitter problem) and Marjorie Krise (who was not at work for a period of time because of an allergic illness) all are properly considered within the unit and that the unit, therefore, consists of 199 employees. On the day the Union demanded recognition by the Company, it possessed only 99 cards—not a majority." The General Counsel takes no serious exceptions to the inclusion of Iaia and Evans, and has agreed to his brief that these two weaving instructors have sufficient community of interest with other production employees so as to be included in the unit. This brings the total number of employees in the unit to 197. The name of Marjorie Krise does not appear on the eligibility list as prepared by the Company for the March 16 election.

The General Counsel introduced 122 signed authorization cards into the record. The Respondent does not contest the authenticity of the signatures on any of the 122 cards in evidence nor was any issue raised with respect to their dates. On or by February 9, when the initial demand for recognition was made, the Union had signed authorization cards from 99 unit employees. Between February 9 and February 14—the date when the Company began its refusal to grant recognition—four additional employees signed au-

thorization cards.[10] I agree that on the basis of the continuing nature of the Union's demand, these cards can be included in computing the Union's majority.[11] Thus, by the time the Company replied to the Union's request for recognition, the Union had obtained a majority of 103 cards out of a total of 199 unit employees, even assuming that Becker and Krise are to be included in the unit. This record further reveals that in the following few weeks the Union obtained 19 additional designations, bring its total of 122 cards, an overwhelming majority out of a maximum unit of 199 employees. In view of the above and in summary thereof, I am convinced, and find, that the February 9 demand by the Union was in fact a continuing demand, and was still in effect when the Union attained its majority status.

One of the primary contentions of the Respondent is that some 30 or more of the authorization cards were signed at

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[10] General Counsel Exhibit Nos. 20-101-96-100-102.

[11] The pertinent portion of paragraph 11 of the amended complaint states as follows: "Since on or about February 9, 1967, and at all times thereafter, the Union has requested, and is requesting, the Respondent to bargain collectively . . . ." Also on February 13, the Union filed a petition for representation (6-RC-4363) and the filing of a petition is viewed by the Board as a request for recognition. In *Scobell Chemical Company* v. *N.L.R.B.*, 267 F. 2d 922, 925 (C.A. 2), where the Court, assuming that the Union lacked a majority at the time of its bargaining request, found that it had such a majority the next day, and held that in the light of the strike and picketing which there ensued, the Union's request for bargaining must be deemed a continuing request. The instant case is somewhat like *Scobell* except that here, instead of striking and picketing, the Union pursued its bargaining request through a representation petition. See *Burton-Dixie Corporation*, 210 F. 2d 199, 200, 201 (C.A. 10), where the Union lacked a majority at the time it requested recognition but where the request was understood to be of a continuing character.

a meeting of the Union on January 29, and it is argued that at this meeting the Union's international representative, Carl Frazier, made it clear in his remarks that the purpose of the cards was "just" to get a Board election. In these respects the Respondent further contends as follows:

> Although in answer to a rebuttal question by General Counsel, Frazier denied that he used the word "just" in commenting on the necessity of cards for an election, it is, nevertheless, abundantly clear that he intended to and did, in fact, create the impression in the minds of the employees that such was their only purpose. Whether he used the words "only" or "just" or some other words at that meeting may never be accurately determined, but the effect of his words on the employees in attendance and their understanding leave no room for doubt.

The language on the cards in the instant case is clear and reads as follows:

> I hereby accept membership in the Textile Workers Union of America of my own free will and do hereby designate said Textile Workers Union of America as may representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

The cards make no reference of any kind to a union election, but the Respondent, nevertheless, sought at the hearing to prove that numerous unit employees were so informed or so believed.

Harry Walters testified that when he signed his card it was given to him by either Jim Edelblute or Harry McGraw, and that at the time he inquired whether he would be a charter member and whether or not he would not have to pay an initiation fee. Walters stated he was then told "that they had the biggest majority of the cards signed and that they were ready to have a vote." Walters also passed out cards to his wife and two other employees, and in so doing he stated, "If you are a charter member, you do not have to pay an initiation fee, so I suggest that you sign the card even though whatever you are going to vote. You vote the way you please."

Mary Lou White testified that she was given the card by an employee named Judy. Judy supposedly told White that the card "just meant that an election would come and it didn't mean anything else."[12] This record shows that every employee who signed an authorization card was then

[12] Shortly after signing her card, White received a union charter membership card with her name and the Respondent's name on the appropriate lines. This card reads as follows:

Textile Workers Union of America
TWUA, AFL-CIO

Charter Membership Card
This is to certify that the bearer of this card

.....

is a charter member of the local union that will be chartered by the Textile Workers Union of America, TWUA, AFL-CIO for the employees of

.....

SOL STETIN
Regional Director
Quin-State Region

mailed the above charter membership card, and also a letter from the Union and certain other materials explaining the Union and its objectives. General Counsel Exhibit No. 21-a through 21-d. White further admitted that she never attempted to revoke her card.

Patrick O'Hara testified that he signed a card at the request of employee Raymond Guella, who allegedly told him that the card would save him "the first year's fee" ($5.00) and "that they would use the card to get the majority of the cards signed, you know, but it was to get a vote going in an election." O'Hara admitted that he read the card before he signed it, and that he never asked for his card back.

Jonas Corbin, Jr., testified that he signed his union card at the meeting where they were first distributed on January 29. Corbin stated that at this meeting he asked Union Representative Frazier if by signing the cards the Union would collect dues from employees even if the Union lost the election, and that Frazier replied in that event the signed cards would be returned and no dues would be collected. According to Corbin, Representative Frazier added that "all he wanted was 30 percent of the people to sign blue cards so we could get an election." Corbin also testified that subsequently he distributed "about ten" cards to other individuals, and told them they should read it and sign, and that "we had to sign 30 percent of the people in the plant before we could even get an election," and "they would definitely be charter members in the Union." Corbin admitted that Frazier read the card at this January 29 meeting.

Maury Delosier testified that he attended the January 29 union meeting where cards were distributed and that Fra-

zier "when he first showed the card, he said this is for the start to get an election, to get the ball rolling."

Paul Ecker testified that he got his card from either Clyde Brown or Ronnie Brackbill, and admitted that whoever gave him the card said nothing, except to ask him to sign. Ecker, in response to the Respondent's question "did anybody call you any names?" testified:

> Oh, there is talk like, "Don't sign the card," and stuff like that. They call you brown nose and stuff like that; You are all for the office and stuff like that.

Nancy Wise testified she signed a card after Union Agent James Myers came to her home. She also stated that Myers told her that there was going to be an election, and that after keeping the card for some time, while an employee by the name of Joyce kept asking her why she did not sign it, she signed it "just to get her [Joyce] off my shoulders." Wise never attempted to revoke her authorization card.

Annette Steinbugl stated that she was given a card by employee Paul Gardner, and was informed that the Union had to have "so many cards" before they could have a vote and that if the Union did not get in the cards would be disregarded, but if the Union won, she would be a member.

Louis Delosier testified that employee Randy Thompson gave him a card to sign and that Thompson told him "it was for an election." On cross-examination, Delosier stated that he signed his card at home, and then admitted that a union meeting he attended—Frazier explained to employees the Union needed 30 percent of the employees to sign cards in order to have a vote and he also admitted that Frazier read the card.

William Sloane attended the union meeting where cards were distributed, and testified he was informed, that 30 percent was needed for an election, and that by signing the card an employee became a charter member of the Union and was exempt from the initiation fee requirement. On cross-examination, Sloane stated that Frazier read the card aloud to the assembled employees, told them that by signing the card they would become charter members of the Union, and if the Union lost the election the cards would be returned to the signers.

Jerome Green testified that an employee named Melvin gave him a union card, but Melvin said nothing to Green about the card. Green stated the union agent, Myers, visited him at his home and told him that "they needed so many for an election." Green admitted that Myers may have visited him after he had signed the card.

George Kaufman was also given a card by Melvin (last name unknown). Kaufman stated he was told by Melvin that he would become a member if he signed, that all the Union needed was about 30 percent to have an election, and that if the Union was successful Kaufman would save the first initiation fee.

Ronald Taddy received his card from James Myers, and testified he was informed by Myers that the Union had to have 30 percent to have an election. Taddy stated that Myers "could have told" him that by signing the card he would become a charter member.

William Nolan received his card from Harry McGraw. Nolan stated that McGraw informed him that "they had to have a certain percentage to join the Union, to get a union started," and that "there would be an election."

Raymond Wakefield testified that Clyde Brown gave him the card which he signed, and told him that if he signed and the Union came in, he would not have to pay an initiation fee, that he would "automatically" belong to the Union.

Benedict Hebler testified that he got his card from a man whose name he does not know. According to Hebler, this unidentified person told him, "if the Union got in, if they get in, I have 30 days to get one or either I'd be laid off . . . ."

Nick Colella testified that Jonas Corbin gave him the card which he signed and that Corbin said "not a thing." Clinton Lane testified that Clyde Brown gave him the card which he signed, that Brown said nothing to him about the card, as "I was with unions before. I knowed about them."

Walter Delosier, Jr., testified that he signed a card at the meeting where the cards were distributed, and at this meeting employee Jonas Corbin asked Frazier about the wording on the cards with reference to union membership. In reply, Frazier allegedly said, "This is just to get the show on the road, so we can get a vote in your plant." On cross-examination, Delosier denied that Frazier read the contents of the card aloud to the assemblage before distributing them. Yet, Jonas Corbin testified as aforestated, that Frazier "read everything that was written on the card" at this meeting. Delosier admitted that he read his card before signing it.

Richard Killinger testified that he signed a union card at his home, after getting it at the mill from a fellow employee named "Jim," whose last name he could not remember. Killinger went on to say that he was told that "they was trying to get a vote into the mill."

The General Counsel produced testimony through Union Representative Frazier to the effect that at the meeting on January 29, he initially mentioned the background of the Union, told the employees what it meant, and he then opened the meeting for questions. Frazier stated that Corbin then asked him if the employees who signed cards would be charged dues if the Union lost the election, and he assured Corbin that if the Union lost, no dues would be collected, and the signed cards would be returned to the employees. Some discussion between Frazier and the employees followed and Frazier pointed out that the Union would have to get 30 percent of the employees to sign cards before he could file a petition and also stated, "I want to point out there has to be 51 percent of the people vote for a union." A motion was then made at the meeting that cards be signed, but before this was done Frazier read the card to employees "slowly" and "carefully." Frazier credibly denied that he ever told the employees at this meeting, or at any other time, that the cards were only for an election. Frazier was corroborated in his denial that he did not tell the employees at the meeting in question that the cards were only for an election. James Myers, a representative of the Union, was also present at this meeting. He testified that Frazier said no such thing. Donald Bradley testified that he made the motion to start signing the union cards, and stated that Frazier never said that they were solely for an election. Bradley also corroborated Frazier's account of reading the contents of the card aloud at the meeting.

In the *Englewood Lumber Company* case, 130 NLRB 394, the Board refused to count authorization cards based on the following considerations. The signatures of two em-

ployees, who were opposed to the Union, were obtained on authorization cards by the representation that an election would be held in which a vote could be cast against the Union as well as for it. About 10 employees testified that they were brought to the point of signature by the belief than an election would result prior to which opportunity for mature reflection upon the question of choice would exist. The Union's solicitor of authorization cards told practically everyone he talked to that the cards would be sent to the Board so that a secret election could be held. The Board stated, "In these circumstances, considering only what the employees were told, and not what may or may not have been their subjective reaction to what they were told, we do not think it can reasonably be said that the employees, by their act of signing authorizations, thereby clearly manifested an intention to designate the Union as a bargaining representative." In interpreting this decision and in applying the rule in subsequent cases, the Board has limited this exception to situations where an employee signs a card upon the representation that the *only* purpose of the card is to obtain an election. In the *Cumberland Shoe Corporation,* 144 NLRB No. 124, the Trial Examiner, relying on the Board's decision in *Englewood Lumber Company* case, held that 17 of the union's authorization cards were not valid for purposes of determining majority status because the employees who signed them testified that they were told, when they were solicited by fellow employees, that a purpose of the cards was to secure an election. The Board held, however, that this case is factually distinguishable from *Englewood Lumber.* The following is quoted from the Board's decision:

> While it is true, as found by the Trial Examiner, that 17 of the signatories testified that they were told that a purpose of the cards was to secure a Board election, it does not appear that they were told that this was the only purpose of the cards. In this case the cards, on their face, explicitly authorized the Union only to act as bargaining agent of the employees, and contrary to the implied finding of the Trial Examiner, the failure of the Union's solicitors to affirmatively restate this authorization does not indicate that it was abandoned or ignored. Thus, there is no evidence there to negative the overt action of the employees in signing cards designating the Union as a bargaining agent, and the instant situation is not one in which the Union beguiled employees into signing union cards.

In footnote 3 to the Board's decision, it is pointed out that the solicitor of the signatures on authorization cards in the *Englewood Lumber* case explained to almost all the employees that the cards were *only* for the purpose of securing a Board election, and thereby secured many signatures including those of two employees who were hostile to the Union. Various employees in the *Cumberland* case testified to the following statements by solicitors: (1) One employee was told that the Union needed to have 80 percent of the employees signed up in order to get an election and that it was to have an election. (2) Another employee was told substantially the same thing and told that the purpose of the card was to secure an election. (3) Another employee was told that the purpose of the card was to bring the union question to a vote in an election. In all, 17 em-

ployees testified that they were told when they were solicited by fellow employees that the purpose of the cards was to secure an election. This testimony was undenied and credited by the Trial Examiner. One employee testified that the talk all over the plant was about trying to get an election.

Thus, I conclude that the tests for determining whether a card should be counted is based, not on what an employee subjectively intended or understood, but on (1) whether he was falsely told that the *only* purpose of the card was to secure an election, or on (2) whether he was induced to sign the card by trickery or beguilement.[13]

The evidence in this record is overwhelming that Frazier never made any representation to employees that the cards were only for an election. While Frazier explained to employees the election goal of the Union's campaign—he also read the language on one of the cards to all the employees at the meeting in order to make clear its unambiguous meaning. Therefore, all cards signed at the January 29 meeting—those of Corbin, Maury Delosier, Walter Delosier, and William Sloane—are valid and are counted.

It is well settled by the Board and the Courts that the mere waiver of initiation fees during a union campaign does not invalidate authorization cards.[14] This information Walters passed on to employees he gave cards to could not have invalidated such cards. With respect to the comment made to Walters that the Union already

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[13] See also *Gotham Shoe Mfg. Co.*, 149 NLRB No. 80; *Boot-Ster Mfg. Co. Inc.*, 149 NLRB No. 91; *Lenz Company*, 153 NLRB No. 120; and *S.N.C. Manufacturing Co. Inc.*, 147 NLRB 770, 92.

[14] *Clothing Workers of America, AFL-CIO* v. *N.L.R.B.*, 345 F. 2d 264 (C.A. 2); *Gruen Watch Company*, 108 NLRB 610, 612.

had enough cards, certainly, cannot serve to invalidate Walters' card. As pointed out there is nothing in the record to show that this representation was the essential, or even one of the essential inducements for his signature. Walters' card, and those of the people who signed at his behest, are clearly valid and are included in making up the Union's majority. The truthful version of Mary White's card signing was given in the testimony of Judith Massini. Massini told White "We would like to get a Union in and I asked her if she would be interested in signing a blue card for that purpose." Massini credibly denied that she ever told White, or anyone, that the card meant only an election and nothing else. The statement made to Patrick O'Hara when he signed his card was to the effect that he would save his first years initiation fee and would be used to get an election. O'Hara was not told that the card was only for an election. Paul Ecker admitted that he was merely asked to sign his card, and his additional testimony that he was called "brown nose and stuff like that" is practically meaningless as Ecker could not identify the source of such remarks, and I agree, that even if he could have identified its source, the quoted portion falls far short of coercion. Ecker's card is valid and is counted. To establish the validity of the card signed by Nancy Wise it is necessary to briefly consider the testimony of James Myers. Myers stated that Wise asked him if there would be an election, and he replied that "under ordinary circumstances" there would be. Wise then expressed some concern that the Company would find out she signed a card—and to this Myers told her:

> Ordinarily, only the union representatives and the Board agent who we petitioned for an election would see the cards, but that there was some possibility the company might request a card check and at that time, there would be a third party involved and then I went on to explain what a card check was and how her card would be used.

Myers denied that he ever informed Wise that the card was only for an election. It is readily apparent that Myers adequately informed Wise of the several possibilities involved before she signed her card and his reference to an election "under ordinary circumstances" must be viewed in gist of the entire conversation. Even if I credit the testimony of Wise that she then later signed her card in order to get an employee by the name of Joyce "off her shoulders"—this would also fall short of coercion to justify the rejection of her card. The card signed by Wise is valid and is also counted. Employee Paul Gardner told Annette Steinbugl that the Union had to have so many cards before a vote was possible—if the Union lost the cards would be disregarded, and if the Union won she would be a member. This is more than being informed that her card was only for an election. Her card is also valid. Louis Delosier attended the union meeting but signed his card at home after talking to Randy Thompson. On cross-examination, Delosier admitted that in signing he knew that his card was not only to get an election, but also to become a union member. He further admitted that Thompson "didn't do too much talking." His card will be

counted. Insofar as the card of Jerome Green is concerned —the evidence shows that Myers visited Green's home in the latter part of February—after Green had signed his card, and, therefore, even assuming that Myers mentioned the vote of election is him—it would have no bearing on this card. Furthermore, Green admitted that the employee who gave him the card—Melvin (last name unknown) did not make any statements to him. Green's card must be counted. George Kaufman made sufficient admissions in his testimony, as pointed out earlier herein, so that his card is likewise a valid authorization. Myers stated that during his talk with Ronald Taddy he informed him:

> I explained the election to him, that we needed 30 percent of the cards signed before we could petition the Labor Board for an election, but I also explained to him the fact that we could possibly have a card check.

Myers then credibly denied that he told Taddy that the card was only for an election. As with all the others, Taddy's card is not the result of any misrepresentation, is valid, and will be counted. William Nolan's card is also counted as there is no evidence that Harry McGraw told him that his card was only for an election. Nolan even admitted in his own testimony that McGraw mentioned to him that they had to have a certain percentage to get the Union started. The argument as to the initiation fee waiver, set forth earlier herein, is equally applicable to Wakefield's card. This card is likewise valid and will be counted. Benedict Hebler suggested in his testimony that the "boy" who gave him his card told him that if the

Union got in he would have 30 days to get a card or would be laid off. Since no one in particular is named by Hebler as making this remark—his testimony can be given no weight. Even though Hebler was able to read to only a limited extent there is no evidence to show that he did not understand the card or that he did not intend to become a member of the Union and authorize it as his representative when he signed it. See *River Togs, Inc.*, 160 NLRB No. 2. In these circumstances Hebler's card is valid and will be counted. The card Nick Colella signed is valid in view of his own testimony that Corbin said nothing to him when he signed it, and, likewise, Lane's card is valid with his admission that nothing was said to him when he signed it. Richard Killinger did not further identify the person who gave him his union card, nor did he specify the source of the statement about getting "a vote." As a result, his testimony is virtually meaningless, and it is apparent that Killinger was not told that the only purpose of his card was for an election. His card is also valid.

In the final analysis here, the testimony of the 20 employees called by the Company is largely a conglomeration of self-contradictions and inconsistent statements when their testimony is carefully evaluated. Where a union's majority is in issue, the controlling question is whether a majority of the employees have voluntarily designated the Union as their bargaining agent. When the evidence of such designation is a signed authorization card, the subjective understanding of the employee as to its meaning or effect, or his intent in signing it, are ordinarly not controlling. As the Court stated in *Joy Silk Mills*, 185 F. 2d 732, 743 (C.A.D.C. 1950):

> It has been held that an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent. [citing cases] Similarly, it has been consistently held that the question is not whether an employee actually felt intimidated but reasonably be said to tend to interfere with the free exercise of employee rights under the Act.

And see *Aero Corp.*, 149 NLRB 1283, 1291 where, in holding that the Trial Examiner did not improperly limit cross-examination of employee witnesses who had signed cards, the Board said:

> The questions propounded . . . were intended to go into the question of 'why . . . [the witness] signed the card.' We agree with the TX that Respondent's counsel was inquiring into the subjective state of mind of the employee at the time the card was signed, a matter which is not material to a determination of the validity of the cards.

The views expressed by the court and the Board in the above cases has been the controlling law.[15] The evidence

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[15] See, for example, *Gorbea, et al.*, 300 F. 2d 886, 887 (C.A. 1 1962); *Bauer Welding & Metal Fabricators, Inc.*, 358 F. 2d 766, 775 (C.A. 8 1967); *Dayco Corp.*, —— F. 2d ——, 65 LRRM 3092 (C.A. 7 1967); *Cumberland Shoe Corp.*, 351 F. 2d 917, 920 (C.A. 6 1965); *Dan River Mills, Inc.*, 121 NLRB 645, 648; *Gary Steel Products Corp.*, 144 NLRB 1160; *Economy Food Center, Inc.*, 142 NLRB 901, 911.

in this record clearly shows that the union representatives and the individual employees soliciting card signatures, made no material misrepresentations in carrying out their organizational efforts. The Union was careful to adequately inform the employees in the purposes of their card, and such is amply demonstrated by Frazier's complete reading of the card at the meeting on January 29. Furthermore, as has been pointed out, shortly after an employee signed a membership/authorization card, he or she was mailed a union charter membership card, together with a letter beginning: "Dear Member: We're mighty proud to have you join as a new member of the Textile Workers Union of America, AFL-CIO." This is directly inconsistent with telling anyone that the card was only for an election. The union organizers frankly admitted and conceded that there was talk of the possibility of an election, however, it is likewise abundantly clear that many other statements and representations were also made to the employees.

It is further noted that many of the employees who testified about their card signing are still working at the mill and obviously all such witnesses had a definite interest in supporting the Respondent's position at the hearing before me, and upon my observation it was evident from their demeanor that they were continuing with a pattern of disavowing union activity ever since the Union lost the March 16 election.

In this instant case the employees signed their names to authorization cards that were clear and explicit. We are not faced with the situation where the cards are ambiguous on their face. Coupled with such facts it is not

trickery or misrepresentation to tell employees to sign cards so that there could be a petition for an election, nor was it violative to tell them that there had to be 51 percent of the employees to vote for the Union. There is no convincing evidence in this record that the employees' signatures were obtained upon the promise that the cards would be used only for the purpose of filing a petition for a representation election. The fact that the employees may have believed that an election would be forthcoming does not offset a concurrent intention to authorize the Union as their exclusive bargaining representative. As the Court of Appeals for the Ninth Circuit stated in *N.L.R.B.* v. *Geigy Company, Inc.*, 211 F. 2d 553, 556, in rejecting a contention similar to that made by Respondent here, the fact that employees may have contemplated that the authorization cards would be used in aid of a petition for a Board election does not preclude a finding that the union was given authority by the signed cards to represent the employees immediately for purposes of collective bargaining. Contrary to Respondent's assertion that the employees were unaware of the purpose of signing cards, and notwithstanding its claim that the Union's majority was the product of misrepresentations to the employees in which some may not have actually read the authorization cards, the record establishes that the employees were fully apprised of the import of the cards, and that the Union provided them with more than ample opportunity to be advised as to their significance. Even after subsequent reflections as to what they had done none of the Respondent's witnesses attempted to revoke their cards.

Based on credibility and other circumstances and factors set forth above, I find that the Union had valid authorization

cards from a majority of the employees in an appropriate unit.

Plant Manager Taylor testified he had doubts as to the Union's majority because in November and December 1966, he heard there were organizing meetings being held and had heard there were never more than 17 employees present at such meetings. Taylor stated he also heard about the union meeting in late January with only 35 to 40 employees in attendance—and most of them had already signed cards —so he felt that this was the extent of the Union's support. Another reason given by Taylor as to why he doubted the Union's majority—was the presence of older employees in the mill who had been there during other previous elections, and in such past periods union efforts had alway been defeated. Taylor further testified he had heard that cards were being signed in the instant campaign so that employees would be left alone. On cross-examination Taylor admitted that no union elections had been held in the plant here involved since he arrived on the scene in December 1964. Further testimony by Taylor on cross-examination shows the following:

Q. Isn't it true that you received General Counsel's Exhibit No. 8 [the Union's initial demand letter] on February 10, Friday?

A. I believe so, yes.

Q. What was the first thing you did when you got that letter? Didn't you contact your attorney in New York?

A. Probably, yes.

Q. I show you General Counsel's Exhibit No. 9, which is a letter signed by you written to the Union dated February 14, 1967, and ask you that isn't it true that your attorneys either gave you the wording or the contents of that letter before you wrote it?

A. Yes.

Normally, an employer may insist on a Board-conducted election. Such an election conducted in a "laboratory atmosphere" is the most accurate and secret method for determining the employees' true desires, although it is not the only method. Where an employer has destroyed the "laboratory atmosphere" by unfair labor practices, calculated to affect the Union's majority and the outcome of the election, as here, the Board has held that this conduct, by its nature and timing, colors an employee's expression of good-faith doubt, and has recognized an alternative method of determining a Union's majority status—by a count of signed authorizations. In order to determine the validity of a claim of good faith, the Board looks to the employer's entire course of conduct. An employer who fails with good reason to respond to bargaining requests of a union which represents a majority of its employees, and embarks, instead, on a course of improper conduct which is either calculated to or tends to destroy that majority, does not demonstrate the good faith required to justify its failure to bargain. The Respondent here, when faced with the Union's request for recognition embarked on an extensive course of illegal conduct which was designed to destroy the Union's majority, and the numerous and repetitious nature of the 8(a)(1) violations have been fully

described above. This conduct began at the very outset of the crucial preelection period, and continued throughout this time, and in this respect sufficient to bring these violations within the Board's *Joy Silk Mills* doctrine. As further pointed out the Company did not confine its unlawful conduct to the preelection period, but continued in its illegal activities even after the election. While the Union's objections to the Respondent's preelection conduct were pending, the Respondent committed violations of 8(a)(2), as aforestated. I agree that this continuing course of illegal anti-union conduct makes a free election impossible in the foreseeable future, and requiring the Union to go to another election would enable the Respondent to profit from its own wrongdoing. Moreover, the 8(a)(2) violation must be attributed and viewed in light of the employer's entire course of conduct, and is therefore another element in the chain of events which refutes the Respondent's contention of a good-faith doubt. Likewise, there is no real substance in Taylor's claims that his doubts were based on past elections and pressure put on employees. Taylor's memoranda to himself on February 2 and 7,[16] purporting to record complaints with respect to pressure on card signers is largely self-serving and it is further noted there is lacking any corroboration from the employees who supposedly were so pressured. Each employee witness produced by the Company also admitted that he or she was first interviewed about signing their individual card just a few days before the trial in this case. If the Company had any real basis for their February belief that employees were being pres-

[16] Respondent's Exhibit Nos. 5 and 6.

sured into signing, it is not adequately reflected in this record. Nor can I see any substance in the testimony that the Respondent's doubt was based on past election failures. Certainly, as the General Counsel points out, such experiences are in no way indicative of present employee sentiments toward a union. It is readily apparent from this record, that the Respondent's asserted reason for withholding recognition have no basis in fact.

As proven by the Respondent's sustained and open gauged campaign of the unfair labor practices engaged in, the Company's rejection of the Union's claim to representative status was made not because of the good-faith doubt as to the Union's majority, but in order to gain time in which to dissipate that majority. Having found that the Union represented a majority of Respondent's employees in an appropriate unit and made a proper request for recognition and bargaining, which Respondent declined, and having found that Respondent's questioning of the Union's majority is for the reasons stated herein, not advanced in good faith, I find that Respondent has refused to bargain collectively in good faith in violation of Section 8(a)(5) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes obstructing commerce and the free flow thereof.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union and the Committee are labor organizations within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees at the Respondent's Altoona, Pennsylvania, plant, excluding office clerical employees and guards, professional employees and supervisors as defined by the Act, constitute a unit appropriate for the purpose of collective bargaining.

4. The Union has been at all times material herein, and is now, the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. Commencing on February 14, 1967, and continuously thereafter Respondent has refused to recognize and to bargain collectively with the Union, thereby violating Section 8(a)(5) of the Act.

6. By dominating and interfering with the formation and administration of the Committee, and contributing support thereto, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(2) of the Act.

7. Respondent and its agent has interfered with, restrained and coerced its employees in the exercise of rights

guaranteed by Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Since the Respondent has dominated and interfered with the formation and administration of the Committee and has contributed support thereto, I shall recommend that the Respondent cease and desist from such conduct and that it withdraw recognition from and permanently disestablish the Committee as the representative of any of the Respondent's employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

I shall further recommend that the Company bargain collectively with the Union, upon request, and that it post appropriate notice to employees as provided in the Recommended Order set forth below, which is found necessary to remedy the unfair labor practices and to effectuate the policies of the Act.

I shall also recommend, in order to make effective the interdependent guarantees of Section 7 of the Act, that the

Respondent cease and desist from in any manner infringing upon the rights guaranteed in said section. *N.L.R.B.* v. *Express Publishing Company,* 312 U.S. 426; *N.L.R.B.* v. *Entwistle Mfg. Co.,* 120 F. 2d 532 (C.A. 4).

Recommended Order

Upon the basis of the foregoing findings and conclusions, and upon the entire record in this case, it is recommended that The Schwarzenbach-Huber Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to close or to move its plant as a consequence of union activity or affiliation.

(b) Threatening employees with loss of work because of union activity.

(c) Interrogating employees as to their union activities, sentiments, and attitudes either individually or in meetings.

(d) Threatening to bargain with the Union on the basis that all existing employee benefits be eliminated.

(e) Unlawfully enforcing a nonexisting no-solicitation rule and disciplining employees for the purpose of defeating union organization.

(f) Dominating or interfering with the administration of the Committee or with the formation or administration of any other labor organization of its employees, and con-

tributing support to the Committee or to any other labor organization of its employees.

(g) Recognizing or in any manner dealing with the Committee, or any reorganization or successor thereof, as a representative of any of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work.

(h) Refusing to bargain collectively with the Union as the exclusive representative of all production employees in the unit set forth above.

(i) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Withdraw all recognition from the Committee as a representative of any of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work, and completely disestablish the Committee as such representative.

(b) Upon request, bargain collectively with the above-named union as exclusive representative of all employees in the above-described bargaining unit, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Post at its plant copies of the notice attached hereto and marked "Appendix." [17] Copies of such notice, on forms to be provided by the Regional Director for the Sixth Region shall, after being signed by a managing representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the said Regional Director in writing within 20 days of the date of the receipt of this Decision, what steps it has taken to comply herewith.[18]

(e) IT IS FURTHER RECOMMENDED that in view of my findings herein the representation petition in Case No. 6-RC-4363, be dismissed.

Dated at Washington, D. C.

/s/ PHIL SAUNDERS
Phil Saunders
Trial Examiner.

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[17] In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words, "the Recommended Order of a Trial Examiner" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals the notice will be further amended by the substitution of the words, "a Decree of the United States Court of Appeals Enforcing an Order" for the words "a Decision and Order."

[18] In the event this Recommended Order by adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Sixth Region in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

Form NLRB-4635A (11-65) TXD-753-67

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT (AS AMENDED)

we hereby notify our employees that:

WE WILL NOT threaten to close or move our plant as a consequence of union activity or affiliation.

WE WILL NOT threaten employees with loss of jobs or work because of their union activity.

WE WILL NOT ask employees as to why they want the Union, what the Union can do for them nor will we inquire into their union activities, attitudes and sentiments either individually or in meetings.

WE WILL NOT threaten to bargain on the basis that all existing employee benefits be eliminated.

WE WILL NOT unlawfully enforce a nonexisting no-solicitation rule for the purpose of defeating the Union.

WE WILL NOT dominate or interfere with the administration of the Committee, or with the formation or administration of any other labor organization of our employees, nor will we contribute support to the Committee or to any other labor organization of our employees.

WE WILL NOT recognize or in any manner deal with the Committee, or any reorganization or successor thereof, as a representative of any of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work.

WE WILL withdraw all recognition from the Committee as a representative of any of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of work, and completely disestablish the Committee as such representative.

WE WILL bargain collectively, upon request, with TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, as the collective-bargaining representative of all our employees in the unit described as follows:

> All production and maintenance employees at the Respondent's Altoona, Pennsylvania, plant, excluding office clerical employees and guards, professional employees and supervisors.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist labor

organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the National Labor Relations Act, and to refrain from any and all such activities.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of Textile Workers Union of America, AFL-CIO.

THE SCHWARZENBACH-HUBER COMPANY
(Employer)

By .....
(Representative) (Title)

Dated.....

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222 (Tel. No. 644-2969).

National Labor Relations Act

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to the rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a). * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for

appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting

aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 615

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
PETITIONER

v.

THE SCHWARZENBACH-HUBER COMPANY

and

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that the Company had violated Section 8(a)(1) of the National Labor Relations Act by disciplining an employee for organizing on behalf of petitioner Union, by coercively interrogating employees concerning the Union, and by threatening to close or move the plant and abolish

jobs if the Union were to win a scheduled Board election (Pet. App. 89a-91a). In addition, the Board found that the Company had violated Section 8(a)(2) and (1) of the Act by dominating and assisting a competing labor organization, the Employee Committee (Pet. App. 94a-95a). Finally, the Board found that the Union had obtained valid authorization cards from 103 employees in a total unit of 197 or 199 when the Company, on February 14, 1967, refused the Union's request for recognition (Pet. App. 97a);[1] that the above unfair labor practices indicated that the Company's refusal was not motivated by a good faith doubt as to the Union's majority, but by a desire to gain time in which to dissipate that majority; and that the Company thus refused to bargain, in violation of Section 8(a)(5) of the Act (Pet. App. 118a). The Board ordered the Company, *inter alia*, to bargain with the Union upon request (Pet. App. 122a).

2. The court of appeals declined to sustain the Board's 8(a)(5) finding and to enforce its bargaining order. It held, first, that the Union did not have cards from a majority of the employees on February 9, 1967, when it first requested recognition, and that this date was crucial in determining the lawfulness of the Company's refusal to bargain (Pet. App. 6a-

[1] When the Union first demanded recognition, on February 9, 1967, the Board found that it had signed authorization cards from 99 unit employees. It was unnecessary to determine, however, whether the Union had a majority on that date, since the Board construed the Union's demand as continuing, and, therefore, still in effect on February 14, when 103 cards, a clear majority, had been obtained (Pet. App. 96a-97a).

8a).[2] Second, it found that many of the cards the Union obtained after February 9 were procured through misrepresentations that they would be used only to obtain a Board election (Pet. App. 9a-20a); that the Company in fact had a good faith doubt as to the Union's majority status (Pet. App. 20a-25a); and that a bargaining order based on authorization cards was "an abomination * * * that serves no other purpose than to afford a method by which elections can be by-passed and the Unions ushered in without giving the employees * * * any voice in the matter" (Pet. App. 25a-26a).

The Court sustained the Board's findings that the Company reprimanded an employee in violation of Section 8(a)(1) of the Act, and that it unlawfully dominated and assisted the Employee Committee (Pet. App. 40a-41a). However, it held that the Board's further findings of violations of Section 8(a)(1), including those relating to alleged threats by the Company president to close the plant, were not supported by substantial evidence (Pet. App. 27a-40a).

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[2] This conclusion rested on these subsidiary findings: (1) the appropriate unit consisted of 199 employees (Pet. App. 5a-6a); (2) cards obtained after February 9 could not be counted since the Union had distributed copies of its February 9 letter claiming majority status to the employees, and the "effect of this widespread diffusion of the Union's false claim * * * was undoubtedly to bring the reluctant sheep into the fold by telling them the fight was over, the Union had won and they might as well get on the bandwagon" (Pet. App. 7a); (3) the Union had obtained only 98 cards as of February 9 (Pet. App. 8a).

3. Petitioner contends that, in declining to enforce the Board's bargaining order in this case, the court of appeals applied principles subsequently rejected by this Court in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575. The Board agrees that the views expressed by the court of appeals on the nature of authorization cards (Pet. App. 25a-26a), on the question of misrepresentation, and on the character of the speeches by the Company president (Pet. App. 17a-20a, 30a-38a) are contrary to this Court's decision in *Gissel*. See 395 U.S. at 601-609, 616-620. It believes, however, that the action of the court of appeals rests independently on a ground which involves no conflict with *Gissel*—*i.e.*, the court's finding that the Union lacked a majority on February 9, 1967, when it first requested recognition, and that in the circumstances of this case subsequent cards could not be counted towards majority status. While the Board also disagrees with this finding, it recognizes that this issue is essentially evidentiary, and hence not appropriate for review in this Court.

For this reason, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

OCTOBER 1969.

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Clerk, Supreme Court, U.S.
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IN THE

Supreme Court of the United States

No. 615

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

THE SCHWARZENBACH-HUBER COMPANY,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT, THE SCHWARZENBACH-HUBER COMPANY IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1969

No. 615

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

THE SCHWARZENBACH-HUBER COMPANY,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT, THE SCHWARZENBACH-HUBER COMPANY IN OPPOSITION

This brief is submitted by respondent, The Schwarzenbach-Huber Company, in opposition to the petition of the Textile Workers Union of America, AFL-CIO, the intervenor in the court below, for a writ of certiorari to review the judgment of the United States Court of Appeals of the Second Circuit dated April 24, 1969. The National Labor Relations Board has not filed a petition for certiorari and has been joined as a respondent in the petition herein.

Questions Presented

1. Whether the petitioner-Union in fact had valid authorization cards from a majority of the employees in the bargaining unit?

2. Whether the respondent-employer's unfair labor practices had the tendency to so undermine majority strength and impede the election process that the possibility of erasing their effects and of assuring a fair rerun is so slight that employees' sentiment is better protected by a bargaining order than a collective bargaining election?

3. Whether the court below was correct in holding that the unfair labor practice findings stricken by it were not supported by substantial evidence on the record as a whole?

Statement of the Case

Following an extended organizational campaign by the petitioner, Textile Workers Union of America, AFL-CIO, the Charging Party and an intervenor in the proceedings in the court below (hereinafter referred to as the "Union"), a representation election on consent of the parties was held at the Altoona, Pennsylvania weaving plant of Respondent, The Schwarzenbach-Huber Company (hereinafter referred to as the "Employer") on March 16, 1967. *By a vote of 106 to 82, the employees rejected the Union as their collective bargaining representative.* Thereafter the Union filed objections to the election and an unfair labor charge which alleged that the Employer had violated Sections 8(a)(1), (2) and (5) of the National Labor Relations Act (hereinafter referred to as the "Act").

After a hearing a NLRB Trial Examiner found that the Employer had committed said unfair labor practices. The Trial Examiner's recommended order would have required the Employer to bargain with the Union as the representative of its employees, despite the Union's loss of the election. The Labor Board reviewed its Trial Examiner's decision and with a few minor modifications, adopted his findings, conclusions and recommendations in

a brief *per curiam* decision. It also adopted the Trial Examiner's recommendation as its order.

The Employer filed a petition for review of the Board determination in the United States Court of Appeals for the Second Circuit and the Board cross-petitioned for enforcement. On March 5, 1969 that court rendered a decision setting aside and refusing to enforce the bargaining order. That decision rested upon the court's holding (1) that the Union did not have a majority, (2) that the Employer's doubt that the Union had a majority was made in good faith, and (3) that the making of a bargaining order under the circumstances of this case would clearly not effectuate the purposes of the Act. It also set aside as not supported by substantial evidence on the record as a whole a number of the unfair labor practice findings of the Board, leaving extant only two minor unfair labor practice findings.

The conclusions of the Second Circuit with respect to the impropriety of the bargaining order rested upon the following factual basis:

(1) The Union's purported majority.

The Second Circuit's conclusion that the Union did not have a majority of the employees was based upon three different factual findings.

(a) The size of the unit.

The Second Circuit found that at the time the Union made a claim of majority status, the number of authorization cards signed by employees was less than a majority of the plant. This, in turn, is based upon that court's conclusion that the number of employees in the unit was 199. The Trial Examiner, in a finding undisturbed by the Board, had held that the unit was at least 197 and

did not indicate one way or the other whether two employees, Marjorie Krise and Vivian Becker were properly in the unit. If Mrs. Krise and Mrs. Becker are included in the unit, the unit becomes 199. The Second Circuit found that Mrs. Krise and Mrs. Becker should indeed be included within the unit. In so doing, they were responding to the invitation of counsel for the Union who requested that court at the oral argument either to make the determination of the proper status of these two ladies itself, or to remand the case for that purpose to the Labor Board.

We will not belabor this Court with the factual setting which led the Second Circuit to determine that Mrs. Krise and Mrs. Becker belonged in the unit since the sui generis circumstances of those two employees in no way involves the important issues of law which are the traditional province of this Court. Suffice it to say, if the Second Circuit's determination of this issue, which was not determined by the Labor Board, is correct then the Union had only 99 employees out of a unit of 199 who had signed authorization cards at the time it requested recognition as the bargaining representative of the employees. Further, all cards thereafter obtained by the Union were signed after the Union's false representation to the employees on February 10, 1967 that the Union had a majority. Accordingly, putting aside all else, the Second Circuit's determination of the status of Mrs. Krise and Mrs. Becker means that the bargaining order was invalidly made by the Labor Board.

(b) The Cards in the Possession of the Union

The Second Circuit analyzed the actual face and back of the authorization cards. Based upon the analysis of this physical evidence, it concluded that the Union had *in its possession,* as of February 9, 1968, only 98 cards

as opposed to the number of cards signed by employees but not yet delivered to the Union. This, in turn, means that even if we assume that Mrs. Krise and Mrs. Becker were not members of the unit, the Union did not have a majority at the time it made its demand for recognition and represented to the employees it had a majority. It only had 98 cards in its possession out of a unit of either 197 without Mrs. Krise and Mrs. Becker or 199 with Mrs. Krise and Mrs. Becker included. Thus, the validity of the bargaining order turns upon how many cards the Union had in its possession at the time it made its demand. The factual determination of the Second Circuit was based upon the undisputable physical evidence of the cards themselves.

(c) The Validity of the Cards

The Second Circuit specifically invalidated a number of the cards because they were vitiated by Union deceits and Union misrepresentations. Thus, the Second Circuit threw out the 35 cards signed at a meeting held on January 29, 1967.

The Union organizer, Mr. Carl Frazier, who spoke at that meeting to solicit the card signing, forcefully implanted in the minds of all the employees present that the cards were just to get a NLRB election. Thus, this is precisely what a number of employee witnesses recall from Mr. Frazier's speech (J. A. 87a, 105a-106a, 114a, 129a*). Although in answer to a rebuttal question by General Counsel, Frazier denied that he used the word "just" in commenting on the necessity of cards for an elec-

* J. A. references are to the Joint Appendix before the Second Circuit. A references are to the Appendix to the Petition for a Writ of Certiorari before this Court. P references are to the Petition for a Writ of Certiorari.

tion (J. A. 155a), the testimony of the employees present establishes that *he in fact, was successful in creating the impression in the minds of the employees that this was their only purpose.*

No statement was ever made that the cards could or would be used to assert a representation claim without an election. Just the contrary was implied when it was stated that should the Union not win an election, the cards would be returned to the employees (J. A. 130, 153a). *Certainly, no employee could have been expected to derive any other meaning from those remarks except that an election was the only purpose for which the cards were being sought.*

The Union's conscious attempt to conceal from employees the alternate purpose for which the cards might be put, is evidenced by the deliberate failure to give a meaningful answer to a question from an employee on the floor at the January 29th meeting asking directly whether the cards were only being sought for the purposes of an election. It would have been simple to truthfully answer that question with a "no", that they might also be used to demand recognition without an election. But instead, Mr. Frazier merely read what the card said.

While the legal import of the card may be clear to those sophisticated in labor law, there is no evidence to support the conclusion that these employees had any real understanding of the possible legal consequences of the phrase "hereby designate [the Union] as my representative for the purposes of collective bargaining ... ." On the contrary, the testimony of the employees reveals that the meaning was far from clear to them. The true meaning of signing an authorization card is a legal question, far beyond the experience or understanding of the average employee. The question which was asked from the floor and which was not answered directly would not

have been asked unless substantial doubt as to the effect of the cards had already existed in the minds of at least some of the employees. By failing to answer the question, the Union intentionally misled the prospective card signers at the meeting (J.A. 90a).

The Second Circuit went on to specifically invalidate the authorization cards of six named employees. Three of them, Jonas Corbin, Jr., William Slone, and Walter Delozier testified they had attended the January 29 meeting and their cards were invalidated because of their attendance at the meeting. The other three were thrown out by the Second Circuit "because of the pattern of misrepresentation, half-truths and evasiveness of the Union organizers" (A14-a).

William Nolan testified that when he received the card from employee McGraw, he was told that there would be an election (J. A. 139a). It was abundantly obvious from Mr. Nolan's testimony that he never intended to designate the Union which he thinks, in his own words, "stinks" (J. A. 139a) despite the fact that he signed a card. Patrick O'Hara testified that the employee, Raymond Guella, who had solicited his card, had told him that if he signed the card he would save the first year's fee and that the cards' purpose was to obtain a vote (J. A. 102a-104a). Ronald Tuddy gave similar evidence with respect to his solicitation (J. A. 135a-137a).

Thus, the final prop for the court below's decision concerning the majority status of the Union is its detailed analysis of six particular instances in which cards were vitiated by Union misrepresentation. As indicated by our discussion in (a) and (b), the Union majority was so tenuous, even assuming that the Union's factual contentions with respect to (a) and (b) are correct, the sustaining of the invalidation of any one of these six cards would substantiate the striking of the bargaining order.

(2) The Employer's Purported Bad Faith.

The Board's order rests upon its finding that the Employer had rejected the Union's demand for recognition in bad faith and hence was guilty of an unfair labor practice under § 8(a)(5) of the Act for refusing to bargain. Putting aside the fact discussed at length above that on February 9, 1967, the time of the only Union demand for recognition, the Union did not have a majority of employees, there is nothing to substantiate such a finding. Indeed, the only pertinent evidence in the record establishes that Plant Manager Brooks Taylor denied the Union demand for recognition based upon a number of circumstances which would have justified such a rejection (J. A. 76a-78a).

(3) The Effects of the Employer's Purported Unfair Labor Practices on a New Election.

The Second Circuit sustained two unfair labor practice findings of the Board, but these violations were of such a trivial nature that they could never have justified the drastic remedy of a bargaining order. The first was based upon the incident called by the Second Circuit "not one of great consequence", in which the Employer warned an employee for soliciting for the Union during working hours although employees were free to solicit when not working and to wear pro-Union buttons.

The second unfair labor practice concerned the existence for a period of some three months following the election of a now discontinued employees' committee. Obviously, such a violation after the election could not have caused the Union's decisive defeat in the election. The brief existence of the employees committee prior to its termination in July 1967 could, similarly, not have any effect upon an election to be held in late 1969.

The Union would have to have a lot more to justify a conclusion that a bargaining order is necessary to counteract the effects of an employer's unfair labor practices. Thus, it is asking this Court to review the Second Circuit's reversal of the Board's unfair labor practice findings. If we assume, for the sake of argument, that the Union is right in this contention, even then the Employer's actions were not such as to preclude a fair election. All the Employer was even charged with by the Board was based upon the following:

1. A series of group meetings held between employees and representatives of the Employer, although neither at such meetings nor on any other occasion was an employee threatened, interrogated, coerced or restrained in the exercise of his rights under the Act.

2. Isolated conversations between three employees who were arguably supervisors and three employees. No employee who was a party to such a conversation was either interrogated or threatened or considered himself to be interrogated or threatened. Of course, three such conversations have no practical effect on a unit of 199 employees.

3. A speech to each shift by the Company President during the election campaign.

4. A cartoon leaflet distributed to employees more than two weeks prior to the election (G. C. Ex. 5, J. A. 174a-175a).

5. Letters of March 9th and March 20th written to employees by Employer executives—one before and one *after* the election (G. C. Ex. 6, J. A. 176a-179a; G. C. Ex. 10, J. A. 185a).

But further, the facts upon which the Board based its reversed unfair labor practice conclusions not only demon-

strate the triviality of the purported unfair labor practice but also the correctness of the Second Circuit reversal of these conclusions.

Thus, the Second Circuit reversed the finding that Mr. Robert Schwarzenbach, the Employer's President, had conveyed a threat directly or indirectly that the plant would move or close if the employees voted for the Union. As the Second Circuit recognized the evidence in the Record refutes such a conclusion. Thus, General Counsel witness Clyde Brown specifically denied that such a statement was made (J. A. 68a-69a). In substances, from the testimony of General Counsel's own witnesses, it appears that while Mr. Schwarzenback told employees that he did not favor a Union and didn't think the Union was necessary, he took pains to assure employees that if the Union did win representation rights at the plant, he would try to work with them. To bolster these assurances, he went so far as to indicate that he had friends in the Union in Washington (J. A. 70a). The fact that Mr. Schwarzenbach pointed out in his speeches to employees that a large percentage of the New England textile industry had relocated in the South was simply a statement of fact and no statement was ever made that Schwarzenbach Huber would follow a similar course as a result of a Union victory. (See testimony of Randolph Thompson, J. A. 53a, and Richard Wiley, J. A. 64a.) Indeed, Mr. Schwarzenbach's assurances negate even any implication which employees on their own could have drawn from the history of the New England textile industry. Moreover, as the witnesses all recalled, the general tenor and emphasis of Mr. Schwarzenbach's speeches were not on what might or might not happen should the Union win the election, but rather a concern for the needs of the Employer to remain competitive in the face of possible Union demands.

Reference to the "Altoona Rayon" plant by the cartoon (Ex. 5, J. A. 174a-175a) must also be viewed in this same context. In the first place, nowhere in the record was it even suggested that the Altoona Rayon plant relocated or closed down because of the presence of the Union. The facts as stipulated (J. A. 72a-73a) indicate not that the plant closed down when the Union organized it, but simply that at the time it relocated it had been under contract with the Union for at least seven years. There is no evidence that the relocation of Altoona Rayon had anything to do with the Union. No witness testified, and General Counsel did not even attempt to prove, that any statement was made that the Employer would follow in the footsteps of Altoona Rayon because of the Union. Indeed, the testimony indicates that the discussion of Altoona Rayon took place not in Mr. Schwarzenbach's speech, but among the employees themselves following his speech (J. A. 64a-65a). No showing was made that Mr. Schwarzenbach instituted, participated or encouraged any such discussion by the employees following his speech.

Similarly in the absence of any proof that the Employer blamed the Union for the relocation of Altoona Rayon, the picture of the Schwarzenbach Huber plant and the Altoona Rayon plant in the cartoon (G. C. Ex. 5, J. A. 174a-175a) must be viewed merely as a reference to the necessity of remaining competitive (a concept repeatedly stressed by the Employer throughout its campaign and a concept which the employees were well aware of).

Likewise, the letters of March 9th and March 29th (G. C. Exs. 6 and 10, J. A. 176a-177a; J. A. 185a) to employees contain no threat that the plant would close or that jobs would be lost if the Union got in. Read in context and with relation to some of the other letters distributed by the Employer (for example, Resp. Ex. 9,

J. A. 204a-205a, the last communication to employees by the Employer before the Election), and the assurances made by Mr. Schwarzenbach in his speech, the letters contain no more than explanation of concern with regard to the Employer's competitive position in the event of organization.

The Second Circuit also reversed the Board's conclusions that the Employer had engaged in illegal interrogations of its weaving room employees at a series of small meetings. It is not disputed that at these meetings employer representatives (specifically Mr. Taylor, and Mr. Gerald Elden, The Employer's Vice President) invited discussions about employees' dissatisfaction with working conditions. As stated by all witnesses to those proceedings, what happened at those meetings was mainly an explanation by the Employer of existing benefits and a discussion of the Union propaganda. Any questions by the Employer were few and far between, general in nature and certainly non-coercive. Most of the questions originated from employees. However, there is not one shred of evidence that at any of these meetings any employee was asked or questioned about his membership in the Union, about his Union activities, or about his Union sentiments or about the Union activities and sentiments of any other employee. In all of the meetings, the only discussion at all with an employee regarding the Union occurred when either Mr. Taylor or Mr. Elden asked Mr. Melvin Kintz (a well spoken employee) why he thought he needed a Union to speak for him. The non-coercive atmosphere of such meetings is indicated by the General Counsel's own witnesses who described the discussions which took place. (See, Bradley, J. A. 45a-46a, Luther, J. A. 50a-51a, Thompson, J. A. 54a, Massini, J. A. 56a, Brown, J. A. 67a).

In addition, there were other scattered isolated incidents involving conversations between *one* employee out of a unit of 199 and a management representative.

Typical of the reversed unfair labor practice findings on such incidents was the one involving the conversation between Supervisor Lewis and Employee Bradley. On this incident, the Second Circuit stated:

> "Just about scraping the bottom of the barrel the Trial Examiner charges as a separate violation of Section 8(a)(1) a conversation between supervisor Lewis and employee Bradley. These two were old and constant, intimate friends. Each was the best man at the other's wedding. All this conversation amounts to is that Lewis, in the conversation with Bradley, referred to some of the group sessions in which some of the employees got the impression, or it was rumoured that 'there was going to be bumping in every department on the floor and also, there was going to be several bosses replaced.' As he knew Bradley was strong for the Union and he suspected Bradley would be President of the Union if the Union won the election, Lewis asked Bradley if there was any truth in these rumours. Bradley replied: 'I attended all the union meetings and not once did I hear any mention of any bosses being replaced.' Bradley also told Lewis that he had no intention of being President of the Union.
>
> "How this disposition of an idle rumour running around the plant can be inflated into an Unfair Labor Practice is beyond our comprehension." (A39a-49a)

Upon this record, the Union would now have this Court not only reinstate all the unfair labor practice findings stricken by the Second Circuit but also hold that such a collection of trivia would preclude the holding of a fair election.

ARGUMENT

The decision of the court below is not in conflict with the *Gissel Packing* decision.

The Union's essential position is that the opinion of the court below was in conflict with this Court's subsequently decided opinion in *NLRB* v. *Gissel Packing Co.*, 23 L. Ed. 2d 547 (1969). In this the Union is apparently in conflict with the Labor Board. In contrast to the Union's seeking a Writ of Certiorari herein, the Labor Board has, subsequent to the *Gissel* decision, paid the costs assessed against it by the Second Circuit and has not petitioned this Court for a Writ of Certiorari.

The Union's position is predicated upon its assumption that the facts of this case are entirely congruent with the facts of the cases reviewed in *Gissel*. Not only are the circumstances of this case different from those in *Gissel*, but these different facts preclude the issuance of a bargaining order precisely because of the standards enunciated by this Court in *Gissel*.

Of course, the Second Circuit in this case took a more hostile attitude towards bargaining orders based upon card checks than this Court did in *Gissel*. But upon examination, the determination of the Second Circuit is entirely consistent with *Gissel*. Indeed, were a similar case to be decided today, *Gissel* would mandate a similar result.

As we indicated earlier, the Second Circuit stated the issue before it in terms of three questions:

> "The propriety of enforcing an order to bargain after a union has lost a representation election depends on the resolution of three questions: (1) whether the Union in fact had a majority; (2) whether the employer refused to bargain because of a good faith doubt of such majority, if the

> Union had a majority; (3) whether on all the facts of the election situation a bargaining order is an appropriate remedy for enforcing the policy of the National Labor Relations Act." (A4a)

We will examine each of these three questions in turn to demonstrate the consistency of the Second Circuit's determination with the *Gissel* standards.

1. Did the Union Have a Majority?

We have pointed out in our discussion of the facts of this case the three-pronged basis for the Second Circuit's conclusion that the Union never had a majority. We need not spend much time on the first two bases concerning the size of the unit and the number of authorization cards possessed by the Union at the time it made its demand for recognition. Both issues are essentially one of fact and are in no way contradictory to *Gissel*. The Union's petition contends, however, that these issues are irrelevant since the Union obtained a majority *after* the demand for recognition (see P. 13-14). This argument ignores the fact that those employees who signed up after the demand for recognition did so after the Union had misrepresented to them that it represented a majority of employees (A4a). Obviously, such a statement would induce previously undecided employees to hop upon the apparently successful Union bandwagon and thus get the benefit of the waiver of Union dues. Of course, nothing in *Gissel* requires a court to honor union authorization cards obtained after such a material direct misrepresentation.

Most of the Union attention is directed to the Second Circuit's findings of misrepresentations which vitiated the cards of the 35 employees at the January 1967 meeting and the 6 named employees. The Union's position apparently is that authorization cards will be counted un-

less there is a direct misrepresentation made in so many words. But this is not what *Gissel* holds. On the contrary, that opinion took pains to make clear that the Board and the courts must examine the surrounding circumstances to determine the effect of the union statements upon the employees. Thus, this Court stated:

> "We agree, however, with the Board's own warnings in Levi Strauss, 172 NLRB no. 57, 68 LRRM 1338, 1341, and n. 7 (1968), that in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the Cumberland rule.[27]"

Footnote 27 states as follows:

> "In explaining and reaffirming the Cumberland Shoe doctrine in the context of unambiguous cards, the Board stated: 'Thus the fact that employees are told in the course of solicitation that an election is contemplated, or that a purpose of the card is to make an election possible, provides in our view *insufficient* basis in itself for vitiating unambiguously worded authorization cards on the theory of misrepresentation. A different situation is presented, of course, where union organizers solicit cards on the explicit or *indirectly expressed* representation that they will use such cards *only* for an election and subsequently seek to use them for a different purpose. . . .' The Board stated further in a footnote:
>
> "The foregoing does not of course imply that a finding of misrepresentation is confined to situations where employees are expressly told in haec verba that the "sole" or "only" purpose of the cards is to obtain an election. *The Board has*

> *never suggested such a mechanistic application of the foregoing principles,* as some have contended. *The Board looks to substance rather than to form. It is not the use or nonuse of certain key or "magic" words that is controlling, but whether or not the totality of circumstances surrounding the card solicitation is such, as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election.'* 172 NLRB No. 57, LRRM 1338, 1341, and n. 7. (Emphasis of insufficient and only contained in this Court's opinion. All other emphasis supplied)

This Court concluded with a warning to the Board not to adopt a more rigid view of the Cumberland Rule:

> "We nevertheless feel that the trial examiner's findings in General Steel (see n. 5, supra) represent the limits of the Cumberland rule's application. We emphasize that the Board should be careful to guard against an approach any more rigid than that in General Steel."

This warning simply echoed the statement of the Second Circuit herein:

> "It may be doubted that the courts deciding *Cumberland* and *Joy Silk* ever intended the rules enunciated in those cases to be applied 'so woodenly' as the Board did in this case and others, to use the expression of Judge Wisdom in *N. L. R. B.* v. *Southland Paint Company,* 394 F. 2d 717, 725 (5th Cir. 1968)." (A17a)

In the light of the record herein particularly concerning the circumstances of the January 29, 1967 meeting any determination that there was not a misrepresentation by the Union is, in the words of this Court, "a too easy

mechanical application of the Cumberland rule" and "an approach . . . more rigid than that in General Steel."

2. Was the Employer's Claim that the Union Lacked a Majority Made in Bad Faith?

The bargaining order imposed by the Trial Examiner and the Labor Board rested upon their conclusion that the Employer's refusal to recognize the Union was made in bad faith. Under this Court's decision in *Gissel,* such a question is no longer relevant. There this Court announced that the Board had abandoned his prior practices in cases such as this:

> "Although the Board's brief before this Court generally followed the approach as set out in Aaron Brothers, supra, the Board announced at oral argument that it had virtually abandoned the Joy Silk doctrine altogether. Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple 'no comment' to the union." (at p. 567)

As a consequence, the Board's finding of an unfair labor practice based upon a so-called bad faith denial and the Union's request for recognition was contrary to the new Board practice specifically approved by this Court. Here, the true situation is precisely opposite to the characteri-

zation of the Union: the Board decision is contrary to this Court's opinion in *Gissel* and the Second Circuit decision is in conformity with it.

3. Is the Bargaining Order in this Case an Appropriate Remedy for Enforcing the Act?

In *Gissel* this Court indicated that where there were Employer unfair labor practices although not "outrageous" and "pervasive" the Board could still issue a bargaining order if these unfair labor practices "have the tendency to undermine majority strength and impede the election processes." This Court went on to indicate the circumstances to be considered by the Board:

> "In fashoning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies though present, is slight and that employee sentiment once expressed through cards would, on balance be better protected by a bargaining order, then such an order should issue (see n. 32, supra).
>
> "We emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order. There is, the Board says, no per se rule that the commission of any unfair practice will automatically result in a § 8 (a)(5) violation and the issuance of an order to bargain."

Obviously, if the Second Circuit's findings on the unfair labor practices are accepted, the two minor unfair labor practices sustained by the Second Circuit "would because of their minimal impact on the election machinery . . . not sustain a bargaining order." Most of the unfair labor practice findings rejected by the Second Circuit likewise fall into such a category particularly since this case involves a relatively large bargaining unit.

The Union (at P. 14-15) contends that a bargaining order should issue because of the alleged threats of the Employer to close the plant. The Union is hence seeking to have this Court first, reverse the Second Circuit's findings on those unfair labor practices and then hold that these reinstated findings require the issuance of a bargaining order.

In *Gissel* the Court sustained the finding both of the Board and the First Circuit in the *Sinclair* case that the employer's statement therein constituted a "threat of reprisal" and hence an unfair labor practice. In so doing, the Court pointed out the limitations of the Board's possible restriction on free speech:

> "But we do note then an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, §8(c) (29 USC §158(c) (1964 ed)) merely implements the First Amendment by requiring that the expression of 'any views, argument or opinion' shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force or promise of benefit' in violation of §8(a) (1)." (at p. 580)

This Court went on to state what an employer is free to do:

> "Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization."

It is just such a conclusion that was made by the Second Circuit herein. Thus it found that the basis for the Employer's prediction was contained in a letter from the company President (quoted in full text in footnote 10) which set forth, in the language of the Second Circuit, "chapter and verse, mentioning details that no man in his senses would have dared to state if they were fabrications." (A35a). Thus, the Second Circuit herein applied precisely the test rearticulated in *Gissel*.

But even if this finding of the Second Circuit were to be reversed, it still does not mean that a bargaining order is called for. The Union contends (pp. 14-15) that "the very nature of the unfair labor practices requires that a bargaining order issue." As this Court stated in *Gissel* "there is . . . no per se rule that the commission of any unfair labor practice would automatically result in . . . the issuance of an order to bargain." Thus, the Labor Board order sought to be restored has no support in the type of findings which the Union is now requesting.

In addition to the restoration of the bargaining order, the Union petition also appears to seek the restoration of the unfair labor practice findings. The factual bases for them we have set forth in the Statement of the Case but we do not believe that we need spend any more time on the application of well-settled rules to essentially trivial unfair labor practice charges.

CONCLUSION

In June of this year, this Court rendered a detailed decision in this area. The opinion in question herein is, as we have demonstrated above, entirely consistent with that decision. The party most directly involved, the NLRB, is not seeking a review herein. Hence there is no reason for this Court now to review this decision and rearticulate the rules it has so recently announced.

Accordingly, for all the reasons stated herein, the Union's petition should be in all respects denied.

Respectfully submitted,

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